EVALUATION STUDY

OF

SPECIAL EDUCATION

DISPUTE RESOLUTION ISSUES

IN CALIFORNIA

FINAL REPORT

February 29, 2000

BY

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ACKNOWLEDGEMENTS

Many people contributed to this Report. This Contractor would like to specifically acknowledge a number of individuals who were invaluable in the realization of this Report:

- The parents, school personnel, and their representatives who were willing to trust in the study process and candidly express their thoughts and emotions;
- Mary Cody, CDE, Auditor, Audits and Investigations Division, for her tireless and supportive assistance in data collection;
- Nikki Milevsky, CDE, Administrative Intern, Special Education Division, for her diligence and willingness to delve into the workings of systematic change;
- Alice Parker, CDE, Director of the Special Education Division, for her vision and courage to endorse an open study process;
- Kathy Moroney, CDE, Special Education Division, Monitor of the Master Contract, for her insight and integrity;
- Glenn Fait and Ed Villmoare and their staff at McGeorge School of Law, Institute for Administrative Justice, for their openness, assistance and willingness to share their information and expertise;
- Loeb Aronin, Chairman, and members of the Advisory Commission on Special Education for their willingness to sponsor the public hearings so integral to this study; and
- The Stakeholders for their willingness to give generously of their time and expertise and, at the end of the study, to trust in its integrity.

CALIFORNIA'S HEARING AND MEDIATION SYSTEMS

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CALIFORNIA'S HEARING AND MEDIATION SYSTEMS

PART ONE - PREAMBLE

California has a hearing system with a success rate on cases appealed to Federal and State court that is enviable for any administrative hearing system. To date, of the forty Hearing Decisions or Orders appealed to court, only two have not been generally affirmed. The Federal Ninth Circuit Court of Appeals has affirmed all twelve cases appealed to that level, and has accorded California's Hearing Officers' determinations substantial deference in the past because the decisions "evinces his careful, impartial consideration of the evidence and demonstrates his sensitivity to the complexity of the issues presented" and were "intensive" and "comprehensive". (Ojai, Supra; County of San Diego v. California Special Education Hearing Office, 93 F.3d 1458; 24 IDELR 756 (9th Cir. 1996); Capistrano Unified School District v. Wartenberg, 59 F.3d 884; 22 IDELR 804 (Cir. 1995); Union School Dist. v. Smith, 15 F.3rd 1519; 20 IDELR 987 (9th Cir. 1994), cert. denied)

"Hearing decisions that are not soundly decided will lead to further litigation, be more likely to be reversed and create higher costs."[1] California's appeal record strongly supports the integrity of the current hearing decisions.

Upon filing a due process hearing request, Local Educational Agencies (LEAs) and parents access mediation 97 percent of the time. Throughout the study, parties expressed support for the mediation system.[2] Over the past five years, an average of only 4 percent of the hearing requests filed, result in a decision. The promise of mediation, and the parties' commitment to resolution through mediation is high.

This is not, as some individuals have characterized it, a system that is "broken". It is, however, a system in need of some improvement. Some of the recommended changes contained in this Report can be effected within the existing system and resources. But, it would be irresponsible to neglect to acknowledge at the outset of the Report, the recommendations that would effect fundamental and meaningful changes in the system will require additional fiscal support to avoid impasse and for the mediation and hearing systems themselves.

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[1] IDEA Regulations: Analysis of Comments and Changes; Federal Register/Vol.64. No 48, March 12, 1999/ pg.12613. Overall finality of California's hearing and mediation systems is also consistent with the intent of the U.S. Congress as expressed in the legislative history of the enabling legislation for the Education for All Handicapped Children's Act, Public Law 94-142: "It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy". (S. Rep. No.168, 94th Cong. 1st Sess. 7-9 (1975))

[2] Significant amounts of data in this Report are based on the Quarterly Reports / Annual Reports issued since 1989 by the Master Contractor for the hearing and mediation systems.

A. COSTS OF THE HEARING AND MEDIATION SYSTEMS

This is a system that is penny-wise and pound-foolish. School Representative

The $3,120,633.44 projected total cost of California's current hearing and mediation systems for 1999 - 2000 is a substantial amount of fiscal support. When the data is viewed in isolation, it is reasonable that top-level California Department of Education (CDE) personnel and budgetary experts registered alarm with the growing number of hearing requests, and questioned the efficient use of State resources as the numbers grew.[3] However, it is the conclusion of this Contractor that the current hearing and mediation systems provide statutorily and constitutionally adequate mediation and administrative adjudication on a "shoe-string".

Nationally, the total number of hearings requested from 1991 to 1998 increased almost 241 percent. California's trend over the same time period is an increase in filings of 235 percent. The past upward trend in hearing requests continues in the latest Quarterly Reports from the Master Contractor for the hearing and mediation systems reflecting a 15 percent average increase in hearing requests over that time period.

Looking at California's population growth over this time period, the number of hearings to the special education enrollment has grown from .2 percent of the population from 1991 - 1995 to .3 percent 1996 - 1999. Nationally, the percentage of hearing requests to the special education enrollment from 1991 - 1995 averaged .01 percent and that average held, increasing only slightly for the two subsequent years.[4]

Nine states actually had fewer requests for a hearing in 1998 than they did in 1991 and for the most recent three-year period, eighteen states showed a decrease in the number of requests.[5] Phone interviews with personnel from six of these states with fewer requests corroborated the findings and the recommendations reflected in Part Two of this Report.

As the hearing and mediation systems were scrutinized for excesses, some unfortunate results occurred. The salary ranges for Hearing Officers and Mediators stagnated at a time when recruitment was difficult and retention at the limited salary range was almost impossible. Fiscal support for pre-service and in-service training was virtually eliminated at a time when increased numbers of new Hearing Officers and Mediators with little previous experience were being recruited, and the body of case law was growing. The allocation of the Senior Hearing Officer's time for the supervision and evaluation of Hearing Officers and Mediators was reduced when the new Hearing Officers and Mediators needed it most. The Master Contractor's conduct of public informational

[3] CDE Audits and Investigations Division – Augmentation Report, September 1998.
[4] Center for Special Education Finance – *The CSEF Resource* Winter 1999-2000; NASDE – Project Forum: *Due Process Hearings: 1999 Update;* CDE Special Education Statewide Enrollment Data and Master Contractor's Quarterly Reports. The age range of 0-3 is included in California's enrollment data, but even with just the age range of 6-21 the difference is not significant.
[5] Data source – NASDE: Project Forum staff.

workshops was eliminated at a time when the message on the availability and conduct of alternative dispute resolution was critical.

The existing fiscal resources dedicated to support the hearing and mediation systems in California must include consideration of those funds expended at the state level and those expended at the local level. It must be noted that cost cutting strategies, that affect the quality of a system, have ramifications throughout the state. For example, less experienced Hearing Officers have more difficulty resolving preliminary matters at the commencement of the hearing, controlling a hearing, making decisive rulings on issues of relevancy and other evidentiary rules that assist in the conduct of efficient hearings, and writing decisions in a timely manner. As a result LEAs spend more money in the engagement of independent experts, payment of their, and prevailing party's, attorney's fees, and more time is diverted from providing services to students, to addressing conflict. Students may spend more time in a stay-put placement that is later determined to be inappropriate, and educational time is wasted. Families may have incurred fiscal sacrifice to engage a representative and/or expert witnesses, and the passage of time aggravates the increased emotional stress on families and any detrimental impact on the relationship with school personnel.

CONCLUSION AND RECOMMENDATION

Stakeholder Agreement

The Stakeholders agree that the hearing and mediation systems have been, and are currently, under funded. In order to effect fundamental change in the systems, the State of California will need to provide adequate support.

B. HONORABLE PEOPLE CAN DISAGREE

"Because parents and educators may not share identical perceptions of the child or goals for the student and because their roles in the child's life as parent and professional are dissimilar, disputes are inevitable and normal."[6]

The resources of the State in the hearing and mediation areas are primarily focused on maintaining the system of procedural safeguards after an impasse is reached between a parent and a school on the identification, evaluation, placement or provision of a free appropriate public education to a student with disabilities. Federal and State law, and the inevitability of the need for third party intervention in some cases, will perpetuate the need for a formal dispute resolution system. This Report includes recommendations to enhance the effectiveness and efficiency of the current hearing and mediation systems.

[6] Consortium for Appropriate Dispute resolution (CADRE) - *Team Based Conflict Resolution in Special Education*, by Anita Engioles, Marshall Peters, Susan Baxter Quash-Mah and Bonnie Todis, June 1996.

It is, however, abundantly clear to this Contractor that to avoid an unnecessary fiscal escalation of the cost of this system and to prevent an erosion of relationships between parents and schools, there needs to be a fundamental change in the way California approaches disagreements between a parent of a student with disabilities and the school, the enforcement of noncompliance, and the enforcement of mediation agreements and hearing decisions.

C. OVERVIEW: PURPOSE OF THIS STUDY AND STUDY DESIGN

As set forth by the CDE in the May 1999 Request for Proposals: Evaluation Study of Special Education Dispute Resolution Issues, the purpose of this study was to conduct an evaluation of the special education mediation and hearing systems in California. The result of the evaluation and any recommendations developed were intended to ensure the systems are consistent with federal law and are fundamentally fair, effective and efficient. Specific required and optional questions to be addressed were included in the Request for Proposal. This comprehensive study was required to be completed in four months.

The general approach of this Contractor, Gail Imobersteg, Esq., Executive Director of Special Education Law Associates, was a comprehensive and open study process. The review of the current systems was heavily focused on an analysis of work products and other documentation from the hearing and mediation systems with extensive consultation with and involvement of individuals and organizations representing the diverse interests and perspectives in the current system. This consultation occurred at all stages throughout the study, including

- Data collection;
- Identification of issues of concern;
- Identification of proposed resolutions; and
- Developing the findings and recommendations.

Upon completion of the data collection phase of the study, this Contractor formulated proposed recommendations and convened a working group of diverse stakeholders to review proposed recommendations, and to participate in the design of the solutions to identified concerns. Each individual in the working group represented a perspective or perspectives of a party or other participant in the process, and had extensive experience with the mediation and/or hearing systems. The Stakeholders:

- Michael Zatopa, Parent Representative
- Diana Smith McDonough, School Representative
- Kathryn Dobel, Parent Representative
- Bob Roice, School Representative
- Joe Feldman, Parent Representative
- Mel Peters, School Representative
- Paul Foreman, Parent Representative
- Valerie Vanaman, Parent Representative

- Lois Weinberg, Parent Representative
- Sharon Watt, School Representative
- Bridget Flanagan, School Representative
- Dale Mentink, Parent Representative
- Jim Hemsley, Special Education Local Plan Area - Director[7]
- Barry Zolotar, California Department of Education
- Larry Siegal, Advisory Commission for Special Education
- Glenn Fait, Master Contractor – McGeorge School of Law
- Ed Villmoare, Master Contractor – McGeorge School of Law
- Larry Norton, Master Contractor – Mediator

Two days were set aside for the Contractor and the Stakeholders to, hopefully, reach negotiated agreement on some, if not all, of the proposed recommendations. At the end of the first day, the Stakeholders unanimously agreed to all aspects of seventy of the seventy-four areas of recommendations set forth in this Report. In the remaining four areas, there was partial agreement on the recommendations and that partial agreement and alternative recommendations are noted in the Report.

All areas of Stakeholder agreement to the recommendations in this Report are noted as such. No presumption of Stakeholder agreement should be inferred to any aspect of this Report that is not identified by the notation "Stakeholder Agreement".

The Stakeholders now speak of a "common vision" for the hearing and mediation systems. The time was short for the completion of this study. Areas of study peripheral to the hearing and mediation systems had to be abandoned to complete the study in a timely manner. This Contractor encourages the CDE to employ consensus-based processes for future controversies in this, and other areas. There is a wealth of expertise in California. The inclusion of diverse interests and perspectives in addressing complex issues offers the State sustainable solutions.

D. GENERAL DESCRIPTION OF THE APPLICABLE FEDERAL AND STATE LAWS

The Individuals with Disabilities Education Act (IDEA: 20 U.S.C. Section 1400 et seq.; 34 C.F.R. Part 300), the California Education Code Sections 56500 et seq. and Title 5, California Administrative Code, Sections 3080 et seq. and provisions of general applicability in the Administrative Procedures Act (Government Code Sections 11400 et seq.) govern the California special education hearing and mediation systems. The IDEA requires the provision of mediation, at minimum, upon the filing of a request for a hearing and the final administrative hearing or appeal to be conducted by the state

[7] The Contractor also solicited names of a Special Education Director to participate in this working group. Unfortunately, the named Directors either did not have extensive experience in the process, or were unavailable. This perspective was available in the working group through the school representatives and the SELPA Director.

education agency. The determination of whether mediation is offered by the state prior to filing of a request for a hearing and whether the state chooses to have a local level hearing with an appeal to the state education agency is within the state's discretion. (Individual requirements of the IDEA and the State law or regulation on the conduct of mediation or hearing are included in the substantive area of discussion in the Report.)

E. GENERAL DESCRIPTION OF THE CURRENT HEARING AND MEDIATION SYSTEMS

Historically, the development of the hearing and mediation systems in California has paralleled that of other states. Since the early years of the Education for all Handicapped Children's Act (P.L. 94-142), the hearing system has gone through several transformations with a system implemented by Hearing Officers within the CDE, a two-tier process with a local panel of Hearing Officers and appeal to the CDE, with a one-tier system implemented first by Hearing Officers who were independent contractors under the supervision of the CDE to Hearing Officers employed and supervised by the Office of Administrative Hearings, to the system currently in place. Education Code Section 56504.5 requires the CDE to contract with a single, nonprofit organization or entity to conduct mediation conferences and special education hearings. Since 1989, the McGeorge School of Law's Institute for Administrative Justice (hereinafter referred to as Master Contractor) has administered the special education hearing and mediation systems, including State mediation available prior to filing for a hearing.

PART TWO - SYSTEMIC CHANGE OUTSIDE THE HEARING AND MEDIATION SYSTEMS

A. CHANGE THE PARADIGM

It is about relationships.[8]

The issue is: where does the trust get lost? We need to deal with the issues prior to impasse. Parent of a student with disabilities

The 'us -them' mentality is misapplied in special education. It is about relationships. Parent Representative

Hearings tend to pull parents and districts further apart. Regardless of who "wins", both parties lose. School Representative

It takes a lot to go through due process, and years to re-establish the bonds and repair the relationship. Parent of a student with disabilities

The relationship is already severely damaged before the hearing process. The existence of a hearing process doesn't contribute to that. The hearing process is simply a means for determining "now what" in relation to the child, given that the parties can no longer make those determinations jointly. Parent Representative

Where there is an opportunity to hear the other side's concerns and where there is an opportunity to construct a solution, the relationship is improved. Parent Representative

The hearing and mediation systems cannot be viewed in isolation. It is about relationships in the classroom, the school and the district, the level of trust and the need for a shared partnership. Disputes are not always about the stated issues, rights, and responsibilities. Often, the real issues are ones of respect, communication, and the perception of fairness. These are the keys to the effective resolution of the disputes.

[8] In an effort to probe the systems' impact on ongoing relationships, this Contractor was asked to review "repeat filings" in the hearing and mediation systems. The identifying codes on 1,849 cases filed revealed that 1 percent of the cases were "repeat filers". No conclusive opinion could be reached on the reasons for repeat filings due to the varied reasons for parents' repeat filings over a three-year period. Of 27 cases files reviewed in detail, a few cases did allege agreed upon services were not being provided.

"If schools can come to appreciate the profound feeling of protectiveness and identification evoked in parents whenever questions are raised about a child's development, they may begin to find new ways of collaborating with them from the beginning . . .Only sensitive, early interventions, that involve professionals and parents working together, are likely to avoid the costly, emotionally draining battles that erupt once they come to disagree on what constitutes an appropriate education for the child."[9]

The emerging wisdom in the unique area of dispute resolution in special education is that the best way to resolve a special education dispute is to prevent the development of the dispute in the first place.[10] A recent study of mediation in New Jersey corroborates this position, concluding that the most effective solution in resolving special education disputes may lie in prevention and developing imaginative approaches to collaborative problem solving. "Only this type of approach is likely to prevent the emotionally and financially draining battles that result from prolonged disagreement about how best to educate a special needs child."[11]

The concept of collaboration involves not just resolving a dispute but resolving it in a maximized way. "Good communication skills are mutual respect skills." Responses may often make the problem worse, or create a new issue without resolving the original problem. Rather than fostering understanding, they may diminish the other's self-esteem, or foster resentment, anxiety, defensiveness or demean the other person's capacity to handle his own problems.[12]

California needs to look toward avoiding impasse wherever possible. Nothing substitutes for collaborative, joint problem solving between schools and parents. For those concerned with the number of filing requests as compared to the special education population, this is an area that holds significant promise in changing the way California is doing business.

From 1995 to 1998, eighteen Special Education Local Plan Areas (SELPAs) show a downward trend in filings for requests for a hearing. Interviews with the Directors of the eleven SELPAs with the most dramatic differences in filing rates reveal a common philosophy of working with parents as partners and a variety of informal efforts focused on personal and early intervention when problems arise, direct access to the Directors, the provision of training to the Districts on special education law, and strong relationships with local parent advocates and the Community Advisory Commission. Several of the SELPA Directors also attribute their reduced filing rate to proactive program development to enable new services and methodology to be provided by the SELPA. This philosophy is consistent with the interviews conducted with the states with decreased filings.

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[9] *Evaluating the Fairness of Special Education Hearings* by Steven S. Goldberg and Peter J. Kuriloff citing Handler, J. (1986) *The Conditions of Discretion. New York: Russell Sage Foundation.*

[10] CADRE: *Resolving Special Education Disputes.* (CADRE - Team Based, Infra.)

[11] *Is Mediation a Fair Way to Resolve Special Education Disputes?* by Peter J. Kuriloff and Steven S. Goldberg, Harvard Negotiation Law Review, Vol. 2 Spring 1997.

[12] CADRE: *Barriers to every Day Communication* by Nancy J. Foster, J.D.

Stakeholder Agreement

- Statewide training and training materials should be available to all parents of students with disabilities and school personnel and to representatives of LEAs and parents of students with disabilities in the following areas:

  - The psychology of disputes;
  - Barriers to communication;
  - Collaborative decision-making and problem solving;
  - The parent and school partnership in the development of Individualized Education Programs (IEPs);
  - How to avoid impasse; and
  - How to resolve an impasse, if reached, including information on the availability of, and participation, in mediation.

Stakeholder Agreement

- This training should be designed to help parents and schools avoid impasse and, if there is an impasse, to foster skills essential to successful mediation and to enhance the prospect of restoring the parent and school partnership after the hearing process. It is important that there be a consistency of philosophy and information in these trainings. Therefore, in consultation with parents, school personnel, school and parent representatives, and the Master Contractor for the hearing and mediation systems, the CDE should be mandated to develop the core materials and the method to implement and evaluate this statewide training. Statewide consistency on the fundamental philosophy and information should be facilitated through methods such as training individuals to be available for assisting in local trainings. The training materials should be available on a widespread basis to allow parents and school personnel who are unable to attend the trainings to access the information.[13]

Stakeholder Agreement

- This training should not be mandated at the local level; however, the goal is that this training be universally provided at the local level. Each community of school personnel and parents has different personalities, cultures, and needs; therefore, each LEA, in consultation with school personnel and parents, should design the local trainings. The training should be a joint training by local parents and local school personnel and the information and approach should be focused on contemporary realistic issues that result in impasse.

[13] Education Code Section 56508 expresses the intent of the California legislature that the CDE develop training materials, that can be used locally by parents, agencies and others, and conduct workshops on alternative resolutions for resolving differences in a non-adversarial manner. Several states such as Alabama, Washington, and Iowa provide training to school personnel and parents on developing problem solving skills to resolve differences. Washington State also provides awareness presentations on mediation.

Stakeholder Agreement

- This training should be available at least annually because of the high turnover in special education personnel and the new parents of students with disabilities entering the system. The CDE should evaluate the training and its impact on an ongoing basis.

Stakeholder Agreement

- The CDE must be provided adequate fiscal support to implement this recommendation. It is also recommended that sufficient funds be allocated to provide a grant to LEAs to support this training endeavor at the local level. The amount of funding dedicated to the local training grants must include consideration of the geographic and demographic challenges in California.

B. TRAINING IN SPECIAL EDUCATION LAW

Public input received during this study convinced this Contractor that some of the perceptions of the lack of fairness in the hearing system are a result of some misinterpretation of the standards in the IDEA and the emerging case law in this area. Training in special education law may prevent procedural violations, inform the parties of the evolving substantive standards in the law, and provide consistent information to assist parties in the accurate assessment of their case, if there is an impasse.

RECOMMENDATIONS

Stakeholder Agreement:

- Statewide training in special education law, at no cost to the participants, should be available to parents of students with disabilities, school personnel, and parent and school representatives.

Stakeholder Agreement

- The training materials should be developed in consultation with parents, school personnel, school and parent representatives, and the Master Contractor for the hearing and mediation systems. The training should be a joint training by parent and school representatives to establish a necessary level of credibility and openness in the training.

Stakeholder Agreement

- The CDE must be provided adequate fiscal support to implement this recommendation. The amount of funding dedicated to conduct this training must include consideration of the geographic and demographic challenges in California.

C. THE HEARING AND MEDIATION SYSTEMS: Access to Information

Training in the hearing and mediation processes would enhance effective advocacy, improve efficiencies in the system, provide predictability, and promote equal access for all families of students with disabilities. Since it is the Master Contractor who administers these systems, this training must be provided by, or with, the Master Contractor.

RECOMMENDATIONS

Stakeholder Agreement

- The Master Contractor for the hearing and mediation systems should provide statewide training in the hearing process, including effective advocacy. The training materials should be developed in consultation with the CDE, and school and parent representatives with extensive experience in the hearing system. Consideration should be given to the development of videos to provide information on how to access the hearing and mediation systems and what to expect as a party or participant.

Stakeholder Agreement

- This training should be available to parents of students with disabilities, school personnel, and school and parent representatives at no cost to the participants. The training materials should be available on a widespread basis to allow parents and school personnel who are unable to attend the trainings to access the information.

Stakeholder Agreement

- The budget for the contract for the hearing and mediation systems must provide adequate fiscal support to implement this recommendation.

D. COMPLAINT SYSTEM

WHAT THE DATA REVEAL

In California's Monitoring Report from the United States Department of Education, Office of Special Education and Rehabilitative Services, April 1999, the Assistant Secretary notified the CDE that she was "...deeply concerned about continuing noncompliance, most notably the California Department of Education's continuing failure to exercise its general supervisory responsibility over local school districts in the State, including ensuring that local school districts correct identified deficiencies in a timely manner. As a result of this failure by the California Department of Education, serious deficiencies have been allowed to exist for a number of years, impacting services for children with disabilities."[14] The three areas of findings of noncompliance related to this Report were in resolving all complaints of noncompliance, meeting the timeline for resolution, and ensuring correction of noncompliance identified in resolving complaints.

Based on data from the CDE on the percent of Complaint Reports completed as of October 1999, the CDE has now completed 60 percent of the inventory of cases in a timely manner, as compared with 30 percent in July 1998. An examination of the results of LEA compliance dated January 2000 reveals that the CDE has recently ordered compensatory education fifty-four times and compensatory reimbursement eighteen times for noncompliance.

Comments received from parents and parent advocates through public input revealed that cases that could have been resolved through the complaint system were diverted to the hearing system. The complaint system is less costly to administer than the hearing system and the time period for the investigation and decision may only be extended under exceptional circumstances. As new protocols on remedies, timelines and enforcement are developed, and upon the United States Department of Education's approval of the revised complaint management system, it is important that the special education community be informed of these changes.

Parents and school personnel are not clear on the process to enforce mediation agreements, which may be due to varied responses from the CDE on this subject.[15] The process for enforcement of mediation agreements should include an expedited investigation of the allegation and an expedited decision. Written consensual settlements between parties reached as a result of procedures initiated pursuant to Education Code Sections 56500.3 or 56501 that do not conflict with State or federal law should also be enforceable through the complaint process.

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[14] April 1999, Letter from Judith E. Heumann, Assistant Secretary, Office of Special Education and Rehabilitative Services.

[15] Letter of July 19, 1999 from the CDE Complaints Management Unit to School District referring a complaint for failure to implement a settlement agreement to the Master Contractor.

RECOMMENDATIONS

Stakeholder Agreement

- Due to the lack of public confidence in the integrity of California's complaint system, some cases that could have been resolved through the complaint process are diverted to the hearing and mediation systems. There is a need for a complete overhaul of the complaint system, including clear and timely procedures for the reconsideration process pursuant to Title 5, California Administrative Code, Section 4665, and clear and unequivocal enforcement for noncompliance.

Stakeholder Agreement

- The CDE must establish written protocols with consistent standards for the complaint system. Where necessary, standards or requirements that may constitute "underground regulations" must be proposed as revisions to the Education Code or Title 5, California Administrative Code.

- The CDE must notify the special education community as soon as possible of:

  - The availability of various remedies through the complaint system for substantiated LEA noncompliance, including compensatory reimbursement and compensatory education, where appropriate;
  - Clear timelines for the investigation and issuance of the decision and the reconsideration process; and
  - Most importantly, the CDE's clear and unequivocal authority and commitment to take meaningful enforcement action when compliance is not achieved within a fixed and reasonable period.

Stakeholder Agreement

- The CDE must establish and communicate its clear and unequivocal authority and commitment to take meaningful enforcement action in an expedited process for failure to provide a service in a mediated agreement, or otherwise fail to implement a mediation agreement or an order in a hearing decision. Written consensual settlements between parties reached as a result of procedures initiated pursuant to Education Code Sections 56500.3 or 56501 that do not conflict with State or federal law should also be enforceable through the complaint process.

Stakeholder Agreement

- For procedures initiated pursuant to Education Code Sections 56500.3 or 56501, the CDE should consider the revision of Title 5, California Administrative Code, Section 4670 or State law to authorize sanctions for the violation of a mediation or settlement agreement, that does not conflict with State or federal law, or an order in a hearing decision.

Stakeholder Agreement

- If necessary, additional fiscal support must be provided to the complaint system to fortify the follow-up and enforcement process and increase the minimum qualifications of complaint investigators.

E. MODELS OF LOCAL INTERVENTION

The concept of "informed consent" permeates the dispute resolution process. Parties must understand and agree to the same process.[16] There is some literature and documented success in California and other states with a variety of local dispute resolution models such as a dispute resolution network, conciliation or informal mediation, ombudsman, school-level mediation, and IEP meeting facilitators.[17]

Local intervention efforts must be clearly articulated as separate from a party's right to file for State mediation and a hearing. It is essential to the integrity of local intervention efforts and the hearing and mediation systems that any local dispute resolution process is entered into knowingly and in good faith by both parties. If the local intervention efforts are not successful, then it is critical that these efforts do not delay timely State mediation and/or hearing. It should be noted, that if local dispute resolution efforts have taken place and are unsuccessful, the parties may become more deeply entrenched in their positions. It is critical that any local intervention efforts enhance agreement, not have the perverse effect of diminishing the potential for success at State mediation with a third party neutral.

Some Stakeholders expressed concern that so much emphasis has recently been put on the local dispute resolution process that the focus has moved away from State mediation. These Stakeholders also raised questions regarding the efficacy and fairness of some of the local dispute resolution efforts, and parental confusion with regard to the relationship of local intervention methods to the hearing and mediation systems. (One Stakeholder noted that the use of the terminology "alternative dispute resolution" infers that it is the State mediation with a neutral third party facilitator.)

The concept of reaching agreement as close as possible to the student and the school should not minimize access to State mediation. A brochure or other written explanation of the hearing and mediation systems, the relationship of local intervention efforts, and

[16] CADRE: *ADR Options - a spectrum of processes.*

[17] See CADRE - *Team Based Conflict*, Supra; NASDE – Project Forum: *Mediation and Other Alternative Dispute Resolution Procedures in Special Education*, August 1996. CDE did conduct a survey of LEAs identified with effective "ADR" programs and identified eight. A limited review of these LEAs during this study showed increases in requests for a hearing in six of the eight LEAs. However, this data is too limited to draw a conclusion on the success of their local resolution efforts. Los Angeles Unified School District records 457 "informal conferences" in 1997 – 1998. Depending on the service unit, 65 to 97 percent of the disputes were resolved and in 1998 and 1999, 558 conferences were held and from 78 to 100 percent were resolved.

the expectations and implications of each process would do much to clarify the confusion, and to inform parents and school personnel of the various options in California's dispute resolution system.

Stakeholder Agreement

- There are a variety of formal and informal models of local intervention to resolve disagreements post-IEP, including the personal intervention of SELPA Directors.

- The following are recommended:
    - The CDE conduct a formal state evaluation of the efficacy of the various local intervention models and determine the consistent elements in successful models;

    - Subsequent to the evaluation of the models, the CDE develop some guidelines for effective local interventions to ensure a degree of standardization, including ensuring such interventions are time-limited and do not deny or delay the right of the parties; and

    - Any local interventions need to be clearly articulated as separate from the hearing and mediation systems, including State mediation available prior to filing a request for a hearing, and must not obstruct access to or minimize the efficacy of State mediation or hearing.

PART THREE - THE HEARING AND MEDIATION SYSTEMS

INTRODUCTORY REMARKS

The goals of this study were to determine whether California's hearing and mediation systems are consistent with the spirit and intent of the IDEA and State law and are fundamentally fair, effective and efficient. The perception of fairness and the perceived focus of the system on the student and his/her receipt of a free appropriate public education are also fundamental to a sound dispute resolution process. For the hearing and mediation systems to have long-term success and to facilitate the parties' long-term relationship, it is important that the parties also experience the system as providing procedural justice.

What is very clear as a result of the study of California's special education hearing and mediation systems is that there is a significant amount of frustration, pain, anger, suspicion, and fear of retaliation between and among the parties who participate in the process. This perception coexists in some communities with a continued erosion of trust and some circumvention of the IEP process which is the cornerstone to not only the educational program for a student with disabilities, but the educational partnership between the parent and the school.

Overall, California's hearing system is fundamentally fair and effective. The mediation system is widely supported by parties who have participated in the system and is also fundamentally fair and effective. However, based on the success rate for mediation, the effectiveness of mediation could be improved. Schools and parents under-utilize mediation prior to filing for a hearing; therefore, its effectiveness as a real alternative to resolve disputes could also be improved.

Based on data such as the adherence to timelines, the decreasing numbers of resolved disputes through mediation, the increasing numbers of days to conduct the hearing and issue the decision, the efficiency of both the hearing and mediation systems is in need of improvement. The clear identification of the issues of disagreement between the LEA and the parent early in the mediation and hearing process is critical to early resolution through mediation, and to the provision of sufficient notice to the parties on the scope of the hearing and necessary evidence.

Fair, effective and efficient hearing and mediation systems are largely dependent on the skill of the Hearing Officers who conduct the hearings and the Mediators who facilitate agreements. The greater the skill of the Hearing Officers and Mediators, the greater the likelihood that California's hearing and mediation systems will meet the high standards and commitment to excellence and efficiency expected by the clients of the system, the Stakeholders and those implementing the hearing and mediation systems. Therefore, this Report begins with the examination of the qualifications, compensation, training, supervision and evaluation of the Hearing Officers and Mediators.

A. HEARING OFFICERS AND MEDIATORS

QUALIFICATIONS AND COMPENSATION

Hearing Officers and Mediators are deciding or facilitating agreements of disputes that could easily result in several hundreds of thousands of dollars worth of requested services and fees, yet Mediators are paid $25.00 an hour and entry level positions in the hearing office are not competitive with government employment and private practice. School Administrator

Mediators and Hearing Officers must exert control over the process. Parent Representative

There is a difference between being fair and benign. Parent Representative

INTRODUCTORY REMARKS

The issues of the qualifications and compensation for Hearing Officers and Mediators must be examined in tandem. Other than the minimal general requirements for Hearing Officers and Mediators in the IDEA and the California Education Code, compensation is the primary factor currently determining the pool of interested candidates for both positions. The retention of employed Hearing Officers has also become an endemic problem in this system. The absence of adequate opportunities for fiscal advancement combined with the stresses of the job, the intrinsic awesome responsibility, workweeks sometimes averaging in excess of sixty hours, and the constant travel all contribute to a "revolving door" pool of Hearing Officers.

CONCLUSION

California's investment in the recruitment, compensation, retention, training, and supervision of the Hearing Officers and Mediators is not commensurate with the demands of the systems and their responsibilities.[18]

Stakeholder Agreement

In order to attract and retain qualified Hearing Officers and Mediators, the minimum level of compensation and qualifications must be raised.

[18] The findings and recommendations of the qualifications and compensation of Hearing Officers and Mediators in this Report are consistent with the American Institutes for Research, September 30, 1998 *Study of Special Education: Nonpublic School and Nonpublic Agency* that, given the magnitude and significance of their responsibilities, Hearing Officers and Mediators appear under compensated.

FEDERAL AND STATE LAW

The IDEA establishes minimum impartiality requirements for Hearing Officers and Mediators and requires that Mediators must be qualified and trained in effective mediation techniques and knowledgeable in laws and regulations relating to the provision of special education and related services. (34 C.F.R. §§300.506(b) and 300.508; 20 U.S.C. §§1415(e) and 1415(f)) The United States Department of Education's analysis and comment of these provisions is particularly elucidating. "The regulatory provisions regarding the impartiality of mediators and the requirement of specialized expertise in laws and regulations relating to the provision of special education and related services is intended to be more stringent than the Federal requirements for impartial hearing officers to ensure that mediation is a more attractive option for parents and an effective option for both parties."[19]

The United States Department of Education declined to regulate on the nature of mediation techniques: "The regulatory requirement for the use of a qualified mediator instructed in effective mediation techniques will ensure that decisions about the effectiveness of specific techniques such as the need for face-to face negotiations, telephone communications, or IEP implementation provisions, will be based upon the mediator's independent judgment and expertise. Therefore, it is not necessary to regulate on these issues."[20]

"Although numerous commenters asked for national standards, training and examinations for impartial hearing officers, decisions about training and hearing officer selection…should be left to States. Since hearing officers' decisions are subject to judicial review, there is a strong incentive for States to choose qualified hearing officers, conduct appropriate training and establish standards of expertise. Hearing decisions that are not soundly decided will lead to further litigation, be more likely to be reversed and create higher costs. In addition, reviewing courts are less likely to give judicial deference to a hearing officer where his or her qualifications show no expertise in the area of special education."[21]

Education Code Section 56504.5 requires the entity conducting mediation conferences and due process hearings to employ persons knowledgeable in administrative hearings and laws and regulations governing special education. Education Code Section 56500.3(d) requires the mediation conference to be conducted by a person knowledgeable in the process of reconciling differences in a non-adversarial manner and knowledgeable in the laws and regulations governing special education. Title 5, California Administrative Code, Section 3082 does apply the singular requirement to Hearing Officers of being knowledgeable in administrative hearings.

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[19] IDEA Regulations: Analysis of Comments and Changes; Federal Register/Vol.64. No 48, March 12, 1999/ pg.12611.
[20] IDEA Regulations: Analysis of Comments and Changes; Federal Register/Vol.64. No 48, March 12, 1999/ pg.12612.
[21] IDEA Regulations: Analysis of Comments and Changes; Federal Register/Vol.64. No 48, March 12, 1999/ pg.12613.

HEARING OFFICERS

Being a hearing officer should be a job an attorney aspires to, not a job you get out of law school and aspire to go private. School Representative

The present Hearing Officers seem to lack legal experience. They are sometimes intimidated by aggressive lawyers. They seem to lack practical experience in law or education. School Representative

And then, the Hearing Officer cried. School Representative

WHAT THE DATA REVEAL

The qualifications and compensation for special education Hearing Officers in other states vary with salaried administrative law judges who are required to be attorneys and contract employees who are attorneys and non-attorneys and paid on a daily or hourly basis with varied pay scales. For purposes of comparison, this Contractor determined the California State government specifications and salary ranges for State agency counsel and Hearing Officers provide a fair base of comparison for the special education Hearing Officers. This determination is supported by the fact that several of the previous Hearing Officers went to State service upon leaving the position as special education Hearing Officer.

An attorney, member of the State Bar of California, with no years of experience will receive from $42,000 to $46,000 a year at the civil service classification of Staff Counsel I. With six years of legal experience after admission to the Bar, an attorney can qualify for the position of Staff Counsel III and receive from $75,800 to $93,588 a year with State benefits.

Entry level Hearing Officers for New Motor Vehicle Board, Agricultural Labor Relations Board, Fair Employment and Housing, Occupational Safety and Health Appeals Board receive from $79,548 to $93,972 a year with State benefits. Hearing Officer IIs for these same agencies can receive between $81,540 and $98,664 a year with State benefits. The qualifications vary somewhat but, generally, the Hearing Officers are required to have either one to two years of experience in the conduct of judicial or quasi-judicial hearings in the capacity of presiding officer, or five years of experience in the practice of law. The five years in the practice of law is required to include two years of experience in the presentation of evidence and the examination of witnesses before a trial court or quasi-judicial administrative body.

The Department of Social Services abolished the entry level Hearing Officer I position in 1988 which used to require the candidate to either be an attorney or to have a Master's Degree in Social Work. Now the entry-level position requires either two years as a Hearing Officer; an attorney (member of the State Bar of California) with five years of responsible experience in the practice of law; or a Master's Degree in Social Work and

five years of social work experience. The salary ranges from $65,760 to $79,548 a year with State benefits.

An Administrative Law Judge I is required to have practiced law for five years and have either one year of experience in the conduct of judicial or quasi- judicial hearings in the capacity of presiding officer or five years of experience in the practice of law, which must include at least two years of experience in the presentation of evidence and the examination of witnesses before a trial court or quasi-judicial administrative body. The salary ranges from $77,700 to $93,972 a year with State benefits.[22]

Entry-level special education Hearing Officers receive from $41,000 to $60,000 a year with benefits.[23] The job of special education Hearing Officer is a great moral and legal responsibility. The absence of adequate opportunities for fiscal advancement, combined with the stresses of the job, contributes to a feeling of failure on the part of the Hearing Officers and departure from the job.

California law does not mandate that the Hearings Officers be attorneys. However, according to the Master Contractor's February 22, 1999 Hearing Officer job solicitation, one year of law practice or comparable experience and demonstrable legal writing skills is currently required. Of the eleven current attorney Hearing Officers, eight were hired within the last two years. Three of the recent hires had practiced law for less than two years at the time of employment and an additional two hires had practiced law for less than three years.

Over the past five years LEAs have been represented at hearing by an attorney or advocate on an average of 74 percent of the time and parents have been represented on an average of 66 percent of the time. In 1995 – 1996, for hearings resulting in a final decision, an attorney or advocate participated in 65 percent of the cases. By 1998 – 1999, this percentage increased to 86 percent of the cases. During July to September 1999, the rate increased again to 95 percent of the cases and during October to December 1999, the rate increased again to 100 percent of the cases.

There is anecdotal data from parties and party representatives of the intimidation of the Hearing Officers by aggressive representatives, reluctance to decisively rule on objections during the hearing and the increasing use of general civil procedural objections and motions in the special education hearings. Being an attorney with experience before a trial court or quasi-judicial administrative body does not guarantee the capacity to serve

[22] The State personnel information is derived from the California's State Civil Service – State Personnel Board – Classification information.

[23] Contract Amendment 3, 1999-2000: McGeorge School of Law, Institute for Administrative Justice, Special Education Hearing Office. Another point of comparison: inquiries to a major law firm in Sacramento County revealed that law school graduates, member of the California Bar, are paid approximately $40,000 - $110,000, at the entry level, with the expectation of an increase in salary to, approximately, $60,000 by the third year for those at the entry level.

as a Hearing Officer and meet increasingly complex challenges. However, it may increase the possibility.

All categories of respondents to the Questionnaire on the special education hearing and mediation systems agreed by a clear majority that the Hearing Officers should be attorneys and that they should have had experience in administrative hearings, as a representative or as a Hearing Officer. All categories of respondents who believed Hearing Officers should be attorneys, wanted the Hearing Officer to have practiced law for five or more years prior to becoming a Hearing Officer. All categories of repondents also wanted the Hearing Officer to be knowledgeable about programmatic aspects of special education, such as assessment instruments and methodologies.

RECOMMENDATIONS

Stakeholder Agreement

- Increase the minimum qualifications for Hearing Officers. There is agreement among the Stakeholders to the construct that the higher the required level of qualifications and experience for Hearing Officers, the more improved the system will be.

Stakeholder Agreement

- There is also agreement among the Stakeholders that the minimum qualifications for Hearing Officers should include:
    - Demonstrable judicial temperament, including the ability to treat all parties fairly, to take charge, to maintain order and decorum in the hearing proceedings, to disregard all prejudicial influence, to assess and evaluate the evidence presented and apply the law; and
    - Demonstrable reasoning and writing skills.

    Employment should be contingent on the successful conduct of a mock hearing.

There is a **split** among the Stakeholders on whether the Hearing Officer should be an attorney. Ten of the eighteen Stakeholders think comparable experience should be acceptable in lieu of being an attorney with at least two years of experience. To demonstrate the degree of controversy, it is worthy to note that the two representatives of the Master Contractor's administrative staff disagree on this matter.

Although there is not agreement among the Stakeholders that the Hearing Officer should be an attorney, this Contractor still recommends that:

- California maintain the current statute permitting non-attorneys to serve as Hearing Officers;
- To address the current needs of the system, require Hearing Officers to be attorneys, member of the bar in good standing with at least two years of experience, preferably more, in at least the next Request for Proposal cycle; and
- Educational experience and experience as an attorney before a trial court or quasi-judicial administrative body, be included as preferred qualifications.

It is the Contractor's judgment that elevating the qualifications and experience of the Hearing Officers is fundamental to an improved system. If the CDE does not accept the Contractor's recommendation that the Hearing Officers be experienced attorneys:

- The "comparable requirements" provision must be carefully considered to ensure the State benefits from the increased compensation and other budgetary recommendations integrally tied to the experience and skill of the Hearing Officer; and
- The quality of the pre-service training and mentoring becomes even more vital, and must be commensurate with the qualifications, knowledge, and experience of the candidate.

Stakeholder Agreement

- ❑ Increase the compensation for Hearing Officers, and maintain cost of living adjustments and opportunities for advancement comparable to State administrative adjudicators.

Stakeholder Agreement

- ❑ The number of Hearing Officers employed by the Master Contractor must consider working conditions conducive to retaining Hearing Officers, including number of hours worked and required travel, and an adequate number of Hearing Officers at an increased level of qualifications and experience to implement the recommendations in this Report.

Stakeholder Agreement

- ❑ Hearing Officers are employees with an annual salary and benefits. Based on December 1999 reported compensation schedules from the State Personnel Board for Hearing Officers, at the date of this Report, it is recommended that the current annual range of salaries from $41,000 to $60,000 be increased to a range of $63,000 to $80,000 with benefits and annual cost of living adjustments consistent with State administrative adjudicators.

MEDIATORS

Some mediators are just messengers or translate English to English. Parent and School Representatives

The process is essentially fair, and the Mediators appear to be essentially fair-minded people looking for areas of possible agreement between the parties . . . I often find the Mediators somewhat weak, unable to articulate for a parent in caucus why an argument is not compelling or why it would not harm their child to agree to something the District has proposed…For this reason it would be helpful for Mediators to be better versed in special education law. Parent Representative

"What makes a competent mediator? There is no universal answer to this question. No particular type or amount of education or job experience has been shown to predict success as a mediator. Successful mediators come from many different backgrounds. Competence depends partly on the context of the dispute and the parties' expectations. It also depends on whether the mediator has the right mix of acquired skills, training, education, experience and natural abilities to help resolve the specific dispute."[24]

Perhaps it is said best by one of California's current special education Mediators with extensive experience in the system:

The most basic qualification, in my opinion is an aptitude for being a mediator. This aptitude is seen in someone who has good people skills, is friendly, capable of being fair, not quick to judge, patient, caring, prudent, intelligent, possesses a good sense of humor, self-assured, self-confident, yet also humble, as in seeing one's place in the universe. Arrogance, judgmental, too pushy, too controlling, impatience and intolerance cause harm. The mediator needs to be without bias, capable of trusting the process, not letting their own needs and belief interfere with the process of parties working out a solution together. A strong sense of honoring others, respecting others, of giving benefit of the doubt, yet still having the ability to maintain order, and the ability to help folks be fair to one another are important qualifications as well.

Knowledge of special education and mediation skills are very important. Through training they can be enhanced, but if the individual has bad judgment that cannot be taught.

WHAT THE DATA REVEAL

All categories of respondents to the Questionnaire think that the ability to work well with people in conflict is one of the most important qualifications for Mediators and that Mediators should be knowledgeable about special education law and the programmatic

[24] The Mediation Information and Resource Center: *What Makes a Competent Mediator?*

aspects of special education. Parents, school personnel and school representatives think Mediators should be required to have practiced as a mediator before becoming a special education mediator. Parent representatives are evenly split on this issue.

According to the Master Contractor's February 22, 1999 Mediator job solicitation, Mediators are not required to meet any minimum qualifications. The solicitation states that Mediators receive training in mediation skills and special education. Prior mediation experience and expertise in the field of education are desirable.

Eight of the twenty current Mediators were hired in the past two years. Prior to being employed as a Mediator by the Master Contractor, eight of the twenty current Mediators had previous experience as a mediator, and five had experience in the field of education.

Although the public input through this study overwhelmingly supported increased qualifications and compensation for the Mediators, the Master Contractor's mediation evaluation survey for 1998 revealed parties' overall evaluation of the Mediators as slightly under the mid-point between the good and excellent ranges. The results of the 1999 survey are consistent in the area of the parties' evaluation of the Mediators. Reconciling the public input through this study and the evaluation survey, it is important to note that these results may say more about the need for pre-service and in-service training in the areas of skill development, special education law and program, commensurate with the Mediator's knowledge and experience in these areas, than about the entry level qualifications of the current Mediators.

California's Mediators, at $25.00 an hour for the past sixteen years, are significantly underpaid. A national survey of paid special education Mediators revealed an average hourly rate of $57.00. The State Department of Developmental Disabilities pays mediators employed through the current Master Contractor at an hourly rate of $40.00. Public policy mediation through the Master Contractor is at an hourly rate of $65.00 an hour. Private mediators contracted through California's Office of Administrative Hearings average an hourly rate of $155.00.

RECOMMENDATIONS

Stakeholder Agreement

- Increase minimum qualifications for Mediators.

Stakeholder Agreement

- The minimum qualifications for Mediators should include:
  - The aptitude for being a mediator, including the ability to work well with people in conflict;
  - Listening and communication skills;

- Experience in facilitating dispute resolution and /or experience in regular or special education with some experience in dispute resolution;
- The ability to assist in the clarification of issues of disagreement;
- Organizational skills; and
- Reasoning and writing skills.

Employment should be contingent on successfully conducting a mock mediation.

Stakeholder Agreement

- Increase the contractual compensation for Mediators and maintain cost of living adjustments and opportunities for advancement.

Stakeholder Agreement

- Mediators are independent contractors with no benefits. Mediators have been compensated at $25.00 an hour for sixteen years. Based on the rate of inflation, this reflects over a 50 percent reduction in salary. At the date of this report, is recommended that the compensation for the contractual Mediators be increased from the hourly rate of $25.00 to an entry level of $50.00 an hour with annual cost of living adjustments consistent with California State employees' rates. It is recommended that the hourly rate salary of $50.00 should range up to $75.00 an hour, based on experience and qualifications, with annual cost of living adjustments consistent with California State employees' rates.

Stakeholder Agreement

- The budget for the contract for the hearing and mediation systems must provide adequate fiscal support to implement the recommended increases in compensation.

B. SUPERVISION AND EVALUATION OF HEARING OFFICERS AND MEDIATION

WHAT THE DATA REVEAL

Commencing in 1998, the Master Contractor instituted a mediation evaluation process to obtain information on satisfaction with the process and the Mediators. The Master Contractor acknowledges these surveys are not particularly useful for the evaluation of individual Mediators. There is no hearing survey or other regular, systematic, and consistently employed evaluation system for Hearing Officers, other than the regular review of hearing decisions.

Over the past ten years, the Master Contractor's allocation of time for a senior Hearing Officer to provide technical assistance, supervision, mentoring, and the evaluation of Hearing Officers and Mediators has been reduced from approximately 50 percent to 20 - 25 percent to enable his deployment as a Hearing Officer. With the increased numbers of requests, the numbers of recently employed Hearing Officers and Mediators with varied qualifications and experience, changes in federal law, the evolving law and motion practice and the initiation of expedited hearings, this decrease in supervision and evaluation of the Hearing Officers and Mediators occurred at a decisive point in the operation of the hearing and mediation systems.

A Mediation Coordinator was engaged recently. The Coordinator will spend approximately 50 percent of her time dedicated to the special education mediation system.

CONCLUSION

The hearing and mediation system does not provide for a sufficient allocation of senior personnel to regularly provide technical assistance, supervision, mentoring, and the evaluation of Hearing Officers and Mediators.

RECOMMENDATIONS

Stakeholder Agreement

- The hearing and the mediation systems must provide for a sufficient allocation of time for senior personnel of the Master Contractor to provide initial and ongoing mentoring, coaching, technical assistance, supervision and evaluation of the Hearing Officers and Mediators. The oversight and evaluation should include mediums such as observation and the review of agreements, decisions, case management records, and verbatim records of the hearings. These individuals should be considered key personnel in the organization chart of a Master Contractor.

Stakeholder Agreement

- The budget for the contract for the hearing and mediation systems must provide adequate fiscal support to implement the supervision and evaluation recommendation.

C. TRAINING OF HEARING OFFICERS AND MEDIATORS PRE-SERVICE AND IN-SERVICE

The Mediators mean well and try hard, but they need professional training in mediation techniques. More cases will settle if they are better trained. School Representative

This is an awesome responsibility. Hearing Officer

WHAT THE DATA REVEAL

As the numbers of hearing requests have risen in a system with budgetary caps, the recruitment and training aspects of the system has been strained. The original system of pre-service training for Hearing Officers under the master contract included visitation to special education classrooms, programmatic training from a school of education in a university, special education law training and the ability to observe a number of hearings, draft decisions, conduct a mock hearing and receive significant coaching and mentoring from a senior Hearing Officer.

Currently the pre-service training for Hearing Officers includes only the following features of the original pre-service training: observing at least one hearing; reading Federal and State law for two days; conducting a mock hearing and writing a draft decision for an observed hearing. Since the system currently uses a Law and Motion practice, the new Hearing Officer will also be assigned as Hearing Officer of the day in Law and Motion for a period of time under the supervision of another Hearing Officer.

The Mediators have varied qualifications and experience and many have never facilitated disputes. The Master Contractor's recruitment process for Mediators includes a videotaped role-play situation to evaluate the Mediator's skills and neutrality. The pre-service training includes the opportunity to observe several experienced Mediators and to assist in mediation before being assigned any cases. Once the new Mediator is assigned cases, an experienced Mediator observes the Mediator for several mediations.

Pre-service training for Hearing Officers and Mediators is critical. Even for experienced administrative hearing officers and mediators, the general informality of these proceedings, the emotional aspect of the disputes and the continuing relationship of the school and the parent add complexity to the administrative adjudicative process and mediation and require a high level of skill. Since five of the eleven recently employed Hearing Officers had less than three years of experience as an attorney, the quality of the pre-service training before they conducted their first hearing was essential and, based on the current program of pre-service training, was insufficient.

A Hearing Officer's and Mediator's knowledge of special education law and program and the skills related to the conduct of special education administrative hearings or mediations are of paramount importance prior to the conduct of the first hearing or mediation. [25] The pre-service and in-service training of the Hearing Officers and Mediators should include the development of skills such as control of the hearing, the balance of power in mediations, employing appropriate strategies and techniques in conflict resolution, writing decisions or clear written mediation agreements that anticipate logistical issues, and the participation of unrepresented parties.

Special education program information such as commonly used tests and other assessment materials, the development of an IEP, and visits to actual classrooms in urban, rural, and suburban school districts with varied socioeconomic and cultural communities should also be included in the pre-service and in-service training. Speakers from a variety of viewpoints on various disabilities, including educational methodology, and relevant educational research should also be included in the programmatic training.

The current in-service training of the Hearing Officers include some generally available national training in special education law, when it is provided in California, and training and consultation with their administrators and colleagues. Mediators receive training twice a year from their senior colleagues and some Mediators have accessed other training on their own. In order to provide varied perspectives and expertise and to continue to enrich the systems, the in-service training program for Hearing Officers and Mediators, particularly in the area of skill development, must have the fiscal capacity to reach beyond in-house training and include other resources.

No funds were specifically allocated for training and conferences for Hearing Officers and Mediators from fiscal years 1993 through 1996 in the master contract budget. Personnel services hours were allowed for training and travel costs and training fees were included in the travel and subsistence variable costs' budget. However, money expended on Mediators' travel alone during this same time period was in excess of the travel and subsistence budget. There were some additional funds allocated for training in subsequent years; but the funds are still not adequate to meet the challenges of pre - and in-service training.

CONCLUSIONS

The current pre-service and in-service training is not commensurate with the responsibilities of the positions of Hearing Officer and Mediator.

Inadequate funding has been provided in the master contract for the hearing and mediation systems for sufficient pre-service and in-service training.

[25] The State of Alaska has an intriguing provision in their law that requires the qualification of Hearing Officers through a training program that is mandated to be open to all residents of the State. (Alaska Education Code 14.30.193(h))

RECOMMENDATIONS

Stakeholder Agreement

- The Hearing and Mediation systems must provide for pre-service and in-service training for Hearing Officers and Mediators in the areas of special education law, special education program, and skill development. The skill development for Mediators should include interest-based mediation.

Stakeholder Agreement

- Five days to ten days of in-service training must be provided annually to all Hearing Officers and Mediators.

Stakeholder Agreement

- The budget for the contract for the hearing and mediation systems must provide adequate fiscal support to implement the pre-service and in-service recommendations, and allow access to outside expertise and attendance at conferences.

Stakeholder Agreement

- Training in special education law, special education program, including school site visitations, and skill development should be provided prior to conducting the first hearing or facilitating the first mediation and must be ongoing, including advanced skill training. The mentoring aspect of the existing Hearing Officer and Mediator pre-service training should be maintained. Due to the anticipated varied background and experience of the Hearing Officer and Mediator candidates, the training must be designed to meet the needs of the candidates and must be provided regularly to stay abreast of the rapidly changing law and need for ongoing opportunities to enhance skills.

- The pre- and in-service training on special education program is the most problematic aspect of the pre- and in-service training because of the possibility of inculcating the Hearing Officers or Mediators with a real or perceived bias. School personnel, parents and disability organizations should be involved in the development of the training material to ensure the content is even-handed and above reproach. It is recommended that the pre-service training also include a panel comprised of a parent or parent representative and school personnel or school representative to ensure the Hearing Officers and Mediators understand the impact of the process itself on the parties.

D. FUNDAMENTAL FAIRNESS AND PERCEPTION OF FAIRNESS

Hearings do not render an educational decision. The decision is based on the quality of the representative and expert testimony, not what is educationally appropriate for the student. School Administrator

When we did go to due process, it was only to find that the system that was ostensibly in place to clarify issues and resolve problems did nothing but confuse the issues and make things worse. Parent of a student with disabilities

Focus is usually not seeking of truth, but rather "winning the case" and avoiding costs. County Mental Health agency

This system is the best truth you can afford. School Administrator

INTRODUCTORY REMARKS

"Parties often begin mediations angry and firmly fixed on their positions. When deeply held personal opinions are under attack or when there is a history of mistrust, emotions are highly charged. These circumstances are especially prevalent in the case of special education and most common in cases involving children who have been in special education for a long time or who have complicated difficulties." [26]

"Agreement, however, is only a superficial indicator of a successful mediation. Even if mediation produces a settlement, the mediation process may not meet one of its central purposes - fairness. In a successful mediation, participants should experience the process of the settlement, and the implementation of the agreement as fair, regardless of resource disparities or the presence of advocates. When measuring the success of mediation in terms of long-term participant satisfaction, the best predictors are perceived joint problem-solving and procedural justice."[27]

There is a developing understanding that mediation will be judged to be fair if it is completed "in ways that communicate dignity, respect, and trustworthy motives on the part of others".[28]

Not surprisingly, the national data and research on the special education hearing process has focused on quantifiable elements. The qualitative elements of the perception of

[26] Kuriloff and Goldberg, Supra. (Harv. Neg. Law rev.) Pg 63

[27] Peter J. Kuriloff and Steven S. Goldberg, Harvard Negotiation Law Review, Vol. 2 Spring 1997 Pg 64, citing Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* Pg 74, (1994); Dean G. Pruitt and Peter J. Carnevale, *Negotiation in Social Conflict 175* (1993).

[28] Kuriloff and Goldberg, Supra. (Harv. Neg. Law rev.);citing Tom R. Tyler and Maura A. Belliveau, *Tradeoffs in Justice Principles, in Conflict, Cooperation, and Justice* Pp 291and 309 (Barbara Benedict Bunker and Jeffrey Rubin eds., 1995).

fairness of the process are clearly more difficult to evaluate, and certainly, in the case of hearings, any party's evaluation of the process must be done before the issuance of the decision.

An interesting area of emerging data is in the area of party correlations on the same mediation experience and hearing experience. In a recent study of New Jersey's mediation system, the research revealed that there was no correlation between perceptions of fairness and the substance of the agreement or perceptions of the mediation process between the parties. "This suggests that parties experienced the mediation differently and that the process often did not improve the relationship."[29] In a study of Pennsylvania's hearing system in 1991, a large and statistically significant difference was found in the perceptions of parents and school personnel on the degree to which they had been accorded their legal rights and the overall fairness of the process.[30]

However, difficult it is to attain, it is this Contractor's belief that in successful hearing and mediation systems, the systems themselves must have the essential philosophy that participants must not only be accorded procedural justice, but should experience the hearing and mediation processes, the agreement or decision, and the implementation of the agreement or decision as fair. This perception of fairness must be present regardless of resource disparities, the participation of advocates, or the quantifiable "win".

WHAT THE DATA REVEAL

HEARING SYSTEM

"When justice is defined as the existence of a strong, reliable, predictive relationship between effectively using the elements of due process and gaining a favorable outcome, due process hearings appear to be achieving one goal Congress intended when it mandated them in special education disputes. But this kind of objective fairness is not all Congress had in mind. It also wanted to ensue that parents could participate in crucial educational decisions about their children, and come away feeling they had been fairly treated. The findings…support earlier anecdotal evidence that special education hearings *do not* achieve this more subjective form of fairness."[31]

Based primarily on the review of over 125 hearing decisions and orders issued in the current system and the appeal record to the Federal and State courts, it is the conclusion of this Contractor that the hearing system is fair. The hearing system incorporates a decision review process by senior staff to ensure compliance with special education laws

[29] Kuriloff and Goldberg, Supra. (Harv. Neg. Law rev.) Pg 64.

[30] *Evaluating the Fairness of Special Education Hearings* by Steven S. Goldberg and Peter J. Kuriloff citing Handler, J. (1986), pg 550 – 551.

[31] *Evaluating the Fairness of Special Education Hearings* by Steven S. Goldberg and Peter J. Kuriloff citing H. Friendly (1975). Some kind of hearing. *University of Pennsylvania Law Review*, 123, 1`267-1317; Kirp, D., Buss, W and Kuriloff, P (1974). *Legal reform of special education*: Empirical studies and procedural proposals. California Law Review, 62, 40-155; and Kirp, D., and Jensen, D. (1983) *What does due process do?* The Public Interest, 73, 75-90.

and additional review for clarity and grammatical accuracy. It is this Contractor's belief that this decision review process is one of the fundamental reasons the decisions withstand appeal with such great consistency and have continued to do so even as the qualifications, training, and supervision of Hearing Officers have diminished. However, based on public input, this "uphold - ability" actually exacerbates the frustration of the parties who perceive the process as unfair and who do not see their experience with the hearing process reflected in the well-written decision.

Despite the overall success of the system as defined by traditional standards of due process, the results of the Questionnaire reveal that the majority of respondent parents, school personnel and school representatives do not think that the current hearing system is fair or focused on seeking the truth. Parent representatives are the only category of respondents who do think the hearing process in fundamentally fair and focused on seeking the truth. This input is consistent with public comment received through the public hearings and interviews with individuals.[32]

The prevailing party data shows that up to April 1998, LEAs had prevailed in 50 percent of the cases and parents had prevailed in 30 percent of the cases. Twenty percent of the cases were split decisions. The data in the Master Contractors' past two Quarterly reports showed a drop in the rate of parents' success rate to 19 percent from July to September 1999 and the rate going back up in October to December 1999 to 33 percent. School personnel asserted through the public input process that they only go to hearing when they have a 98 percent or higher change of prevailing. Parent representatives are concerned with the relatively low rate for parents and, in particular, with the recent drop in July to September 1999. Neither is satisfied with the prevailing rates of success, and express concerns regarding the fairness of the process.

There is a split in the results of the Questionnaire between parents, school personnel and representatives on whether the hearing process is designed to ensure a student with a disability is provided a free appropriate public education. The majority of parents and school representatives do not think the hearing process is designed to ensure a student with a disability is provided a free appropriate public education. The majority of parent representatives and school personnel think it is.[33]

[32] The Questionnaire results reveal that sixty-eight percent of parents, sixty-six percent of school personnel and seventy-eight percent of school representatives in the system do not think the hearing process is fundamentally fair. In contrast, sixty-six percent of parent representatives do think the hearing process is fundamentally fair. Fifty-four percent of parents, sixty-eight percent of school personnel, and fifty-nine percent of school representatives do not think the hearing process is focused on seeking the truth. Again, there is a contrast with parent representatives, with fifty-five percent who do think that the hearing process is focused on the truth.

[33] The Questionnaire results reveal that sixty-five percent of parents and fifty-seven percent of school representatives do not think the hearing process is designed to ensure a student with a disability is provided a free appropriate public education. In contrast, sixty-two percent of parent representatives and fifty-two percent of school personnel do think the hearing process is designed to ensure a student with a disability is provided a free appropriate public education.

MEDIATION SYSTEM

It is the conclusion of this Contractor that the mediation system is fair. Since mediation is a voluntary aspect of the State dispute resolution process, the perception of the fairness of mediation, including the Mediator's ability to "balance the power" for unrepresented parties, is critical. The Questionnaire results for the mediation system reveal an improved perception generally on the issue of fairness as compared to hearings, but the results are uneven between the respondent parties and the respondent representatives on the fairness of the mediation process. The majority of parents do not think the mediation process is fundamentally fair, and although the majority of school personnel generally think it is fair, the high majority of school personnel with extensive involvement in the process do not think it is fair. The clear majority of parent and school representatives think the mediation process is fundamentally fair and the numbers increase for those parent and school representatives with significant involvement in the system.[34]

As evidenced in the comment areas of the Questionnaire, the respondents hold their views on mediation strongly; the laudatory comments and the detractions are equally ardent. The results of the Master Contractor's 1998 mediation evaluation surveys reveal parties' satisfaction in all survey areas, except one, in the good to excellent range. The one area that was slightly below the good range was the degree to which mediation assisted in resolving the parties' dispute.

CONCLUSION

California has sound hearing and mediation systems that accord the parties procedural justice. Improving the perception of the fairness of the hearing and mediation systems is not as simple as increasing the qualifications and training of the Mediators and Hearing Officers and improving the efficiency and effectiveness of the systems, but these improvements will go a long way toward approaching that goal.

[34] Eighty percent of respondent parents do not think that the mediation process is fundamentally fair. Seventy-two percent of respondent school personnel think the mediation process is fair. In sharp contrast, fifty-five percent of school personnel with significant involvement with the mediation system do not think that the mediation process is fair. Seventy-seven percent of parent representatives and 100 percent of school representatives with significant involvement in the mediation system overwhelmingly think the mediation process is fundamentally fair.

E. THE ONE-TIER HEARING SYSTEM

Due process in California has become overly technical, incentive driven, and exceedingly expensive. School Administrator

The cases today are very complex, very costly and have significant long-term ramifications. The current process.... is not equal to the challenge. School Representative

Achieving a balance between increasing efficiency and maintaining effectiveness is a challenge in a complex system like California's. Solutions to increase the efficiency and effectiveness of the hearing system abound. For example, the simplest solution to the lack of timeliness in California's hearing and mediation systems would be to eliminate "off calendar" agreements and elevate the standard for "good cause" for continuances. However, the simple solution for California may exacerbate the existing concerns with the systems and, potentially, may deny the parties due process.

There were a number of well -intentioned recommendations, during the public input process, to add additional processes to the hearing system to resolve issues of efficiency. Some individuals suggested returning to a two-tier hearing system, or instituting a "fast-track" process for certain issues.[35] There are still some states that employ a two-tier hearing system with some success, however it must also be noted that the national trend in recent years has been to move from a two-tier to a one-tier system. Since 1991, five states have moved from a two- to a one-tier system, while no states have changed in the other direction.[36]

Some states do have intriguing intervening processes such as Maine's advisory rulings, Massachusetts's advisory opinion process, New Hampshire' neutral conferences (similar to arbitration) and Oregon's fact-finding panels. There is a certain appeal to these "quick fixes". However, California's hearing and mediation systems have a unique culture and history and it is important that California not choose the expedient solution in the sincere desire to improve the system. It is strongly recommended that the CDE consider the implementation of recommendations in this Report and continue to explore efficiencies within the existing system with the Master Contractor, parents, school personnel and their representatives, before abandoning a largely effective system.

[35] Historically, it must be remembered that the major reason California abandoned the two-tier system was the high number of appeals from lower level decisions and the inherent delays in a two-tier system.
[36] NASDE - Project Forum: *Issue: Due Process Hearings*: 1999 Update, December 1999.

F. TIMELINESS OF THE HEARING AND MEDIATION SYSTEMS

There are children sitting at home for a whole year while the process is being completed. Parent of a student with disabilities

I think requiring that mediation take place in a timelier manner would be helpful. With represented parties, it drifts because of the attorneys' busy schedule. School Representative

And, then the attorneys went on vacation. Parent of a student with disabilities

FEDERAL AND STATE LAW

The IDEA requires a final decision to be reached, and a copy to be mailed to the parties, within forty-five days after the request for a hearing. (20 U.S.C. §1415; 34 C.F.R. §300.511) Except in the case of expedited hearings, a Hearing Officer may grant specific extensions of time beyond the forty-five day period. Each session of mediation is required to be scheduled in a timely manner and may not be used to deny or delay a parent's right to a hearing or to deny any other rights afforded under Part B. (20 U.S.C. §1415(e); 34 C.F.R. §300.506(b)(ii) and §300.506(b)(4))

Education Code, Section 56505(f) requires the Hearing Officer to extend the forty-five day timeline for a hearing upon the request of a party and a showing of good cause. Under Education Code Section 56501(b)(2), mediation will be scheduled after filing a request for a hearing if the parties agree to mediate and are willing to extend the forty-five day limit for issuing a hearing decision equal to the length of the mediation process.[37] This limitation on the period of extension for participation in a mediation conference is not applicable if the parties agree to take the hearing "off calendar". Education Code Section 56502 requires the Superintendent of Public Instruction to take steps to ensure that within forty-five days after receipt of the written hearing request that the hearing is immediately commenced and completed, including any mediation, and a decision rendered, unless a continuance has been granted.

Education Code Section 56500.3(e) requires the prehearing mediation conference to be scheduled within 15 days after receipt of the request. The mediation conference must be completed within 30 days after receipt of the request unless both parties to the prehearing mediation conference agree to extend the time for completing the mediation. Although it is not clear in the statute, this same timeline has been interpreted to apply to a mediation conference after the filing of a request for a hearing.

[37] Although the Education Code establishes the right to "request a mediation conference", there is an inferred limitation on access to mediation after filing a request for a hearing. CDE should carefully examine this provision in their review of the laws and regulations relating to the hearing and mediation systems.

INTRODUCTORY REMARKS

The community of practitioners in California in the area of special education law is relatively small. The delay in calendaring mediations and calendaring hearings is often caused by the lack of availability of the parent and school representatives. It is also recognized that the collaborative approach, which supports the essential ongoing relationship between parents and schools, takes time. Sometimes the greatest progress toward agreement can made between mediations sessions, not at mediation sessions.[38]

Although "off calendar" cases require the agreement of both parties and can be put back on calendar at the request of either party, this figure is of concern when the IDEA requires that mediation not be used to deny or delay a parent's right to a hearing, or any other right afforded under the IDEA. (34 C.F.R. §300.506(b)(i)(ii)) The acceptability of parties' agreement to an extension is acknowledged by the United States Department of Education. "In general, a hearing officer should not extend the timelines for a due process hearing based on the fact that there is a pending mediation unless both parties have agreed to an extension."[39]

Many of the representatives for parents and schools provided public input during this study that they are not concerned with the issues of timeliness that troubled this Contractor, and strongly support the ability of the parties to go "off- calendar" as vital to the workings of the system. The Questionnaire, however, reveals some mixed results on the overall issues of timeliness. The results of the Questionnaire are generally favorable on the importance of "off calendar" to the success of mediation.

It is not the existence of "off calendar" and the plethora of continuances that are problematic. What is of concern is the fact that long delays between events have become institutionalized as an inherent part of California's system. There is a growing acceptance, even complacence, that this lack of timeliness is an acceptable price for procedural justice in the special education hearing and mediation systems.

It is the position of this Contractor that the lack of timeliness in California's hearing and mediation systems:

1. Is detrimental to the student with disabilities if the "stay-put" is not appropriate to meet the needs of the student;
2. Is detrimental to the relationship between the parent and the school in the absence of resolution as the process evolves into different IEP review cycles;
3. Complicates the evidentiary orderliness of the process as important witnesses disappear and new evidence emerges as the student's educational needs change;
4. Encourages the multiplicity of disagreements over several IEP cycles and lengthy and complicated hearings; and

[38] *Collaboration and Conflict Resolution in Education*, by James c. Melamed, J.D., and John W. Reiman, Phd. Pg. 2 The Mediation Information and Resource Center.
[39] IDEA Regulations: Analysis of Comments and Changes; Federal Register/Vol.64. No 48, March 12, 1999/ pg.12612.

5. Increases the cost of the systems, including attorney's fees and, therefore, limits access.

Certainly avoiding inconvenience to adults is not an intended aspect of the special education mediation and hearing systems. In these systems, however, it is the adults who are advocating for the student's procedural and substantive rights and the systems must give due regard to the convenience and necessity of the parties and their representatives.[40] Therefore, continuances should be granted whenever justice so requires. Good cause for continuances does not, however, mean the continuances should be generous and allowed beyond a reasonable period of time. The administration of the mediation and hearing systems by a Master Contractor must ensure the focus remains on the timely resolution for the student with disabilities.

WHAT THE DATA REVEAL

There are several critical timelines in the current hearing and mediation systems that affect the timely resolution of disagreements and the issuance of hearing decisions:

1. The period from filing to the commencement of mediation;
2. The completion of mediation;
3. The conduct of the hearing; and
4. The issuance of the decision.

Continuances and cases "off calendar" are now the rule, not the exception, in California. An examination of cases through this study revealed that, as of December 13, 1999, 92 percent of open cases were "off calendar". Of the cases decided from January 1999 to November 1999, the average number of months from a request for a hearing, without mediation, to issuance of a decision is 3.8 months.

A random sample of ten decisions issued between January 1, 1998 and November 30, 1999 revealed that from filing to issuance of a decision, took an average of 6.2 months. Written closing argument and briefs are not a right of the parties; yet the parties routinely submitted them, and an average of 30 days was allowed for submission in these cases. The decisions in these cases were issued on an average of 39 days after the hearing records were closed. Even giving consideration for the days of tolling for continuances, three of the ten cases did not meet the forty-five day statutory requirement for the issuance of a decision.

The average number of days of hearing has almost doubled in a ten-year period, from 2.2 days per hearing to 4.3 days per hearing. This trend is also reflected in the last two Quarterly Reports that report an average of 4.2 days per hearing from June to September 1999 and 3.8 days per hearing from October to December 1999.

[40] 2 Fed Proc, L Ed, pg. 167; 2 Am Jur 2d, pg. 341.

These are troubling figures in a due process system designed to address educational issues for a student with disabilities in an expeditious manner.

The period from filing to the commencement of mediation

The initial delay in calendaring mediation is often caused by the schedules of the parent and school representatives. However, during the past five years there have been periods of time when the delay in initial contacts and in the scheduling of mediation was caused by the unavailability of Mediators. A lapse in time at this critical juncture unduly allows the escalation of anxiety for both parties, and causes them to begin the difficult and expensive process of preparing for hearing. An effective mediation system must ensure that Mediators are available to contact the parties and provide mediation as soon as possible, but no later than two weeks.

The completion of mediation

An examination of cases in this study that were opened and closed between January 1, 1999 and September 30, 1999 as a result of successful mediation revealed only 19 percent of the cases were resolved within forty-five days. A survey of the Mediators revealed that only 45 percent of the assigned mediation cases are currently scheduled for active mediation sessions.

The following was a typical survey response from a Mediator: Thirty-six cases are active open cases and 39 cases are inactive and not withdrawn. "Inactive cases are cases where parties are not seeking any activity and will contact me when and if they choose, but where they have not reached a final agreement, achieved dismissal, or withdrawn the due process filing for the case. Parties often keep cases in this inactive status to ensure compliance with interim agreements or to maintain leverage in their activities with each other." Another Mediator reported that 104 of the Mediator's cases were "off calendar" with only 30 in mediation; another 23 were in the process of being dismissed and the balance of the cases were "going to hearing". Some of those cases "going to hearing" went back as far as two years.

It is recognized that pauses in mediation activity, in some situations, can be helpful to effectuate resolution; in other cases the pressure of the impending hearing can be a motivating factor. The system must include organizational mechanisms and interventions to ensure that the mediation process is not open-ended and/or used for enforcement purposes or as an educational threat. The Master Contractor recently introduced the use of contingent final mediation agreements with a definitive effective date to close cases. This practice should help to bring closure to cases now that are typically in an "interim" agreement status for long periods of time.

There is no consistent protocol in the hearing and mediation systems for case management or a clear designation of anyone in the system who is responsible for ensuring there are no unnecessary delays in cases from the filing of a request for a

hearing to the issuance of a decision. Particularly with the institutionalized "off calendar" feature in California's law and the busy calendars of the small community of practitioners, the system itself must include active case management to ensure that cases do not languish. Consistent case management could assist in maintaining the momentum of mediation and hearing activity.

In the past several years, a notice has been sent to parties that a case with no activity for six months would be dismissed. However, six months in the educational life of a child is still too long. Mediators and parties also reported that this six-month notice is not sent on a regular basis, and little justification is required to keep the case going. (One Mediator reported he had twenty cases over-due for the issuance of the six-month notice.) It must be remembered that during delays in the systems, the relationship between the school and parent is often strained and in some cases another IEP cycle has begun.

The management of cases and documentation of information are tasks that Mediators are routinely expected to perform in almost all mediations.[41] For those cases involved in mediation, it is the Mediator who can most ably manage cases up to the scheduled hearing date. For those cases involved in mediation and "off calendar", case management by the Mediator should be up to, at least, the referral to the hearing system for the scheduling of a hearing date, if mediation is unsuccessful.

All Mediators must have the designated responsibility and time to manage cases, the skill to control the mediation process, assess the prospect of mediation and the affect of delay, to know when to push and when to step back, and the organizational skills to efficiently trigger action. There should be protocols for Mediators on case management, which should include a basic template for managing and reporting the status of cases and the requirement for Mediators to report information on a weekly basis on the status of all cases in their caseload. This information will assist in the allocation of cases among the Mediators and assist in calendaring hearings.

The Conduct of the Hearing

In response to the Questionnaire, school personnel, by only 36 percent, and their representatives, by only 22 percent, think hearings are almost always or often held within a reasonable time from the date of the request. In contrast, parents, by 87 percent and parent representatives, by 58 percent, think the hearings are almost always or often held within a reasonable time from the date of the request.

As the magnitude of the hearing and mediation systems have increased over the years, the calendaring process has become a critical aspect of resource management in a system where an average of only 7 percent of the cases filed go to hearing. The current calendaring system has the markings of the job stress of an air traffic controller, due to its brinkmanship.

[41] CADRE *"Five Steps to Choosing a Qualified Mediator"* - Consumer's guide to Mediation published by the Alaska Judicial Council.

In the current system, dates for hearings are automatically scheduled without consultation with the parties. In interviews with party representatives, this automatic calendaring practice was cited as a major reason for cases being continued and placed "off calendar" at the beginning of the process. In addition, cases are generally scheduled for two consecutive days and additional days, if necessary, are scheduled after the hearing convenes. This latter practice results in unnecessary attorney's fees and:

- Causes a delay in the issuance of the decision;
- Causes a loss of continuity in case presentation;
- Results in the inefficient use of hearing time due to unnecessary repetition in case presentation;
- Encourages evolving issues and rolling evidence due to the passage of time; and
- Causes multiple incidences of case preparation.

A week before the hearing week, the calendaring clerk prints a list of all hearings scheduled for the upcoming week. The clerk then must contact each Mediator assigned to the case or the parties involved, to determine the status of the case. On the Thursday before the scheduled hearing week, she creates the hearing schedule. Since updated information continues to come in even after the development of the hearing schedule, there are, routinely, cases listed that are removed from the schedule. Based on data in the calendaring process over a nine-month period in 1999, an examination of five randomly selected weeks of calendaring schedules revealed only an average of 7.4 percent of the cases listed to convene a week before the hearing week, actually went to hearing. An average of 36.6 percent of the cases were continued at the last minute (after the Thursday before the scheduled hearing week).

For those cases where mediation is waived or is unsuccessful, the pre-hearing process, including the calendaring system, must include the clear designation of responsibility to ensure that there are no unnecessary delays in the conduct of the hearing and the issuance of the decision. It is the assigned Hearing Officer or a presiding Hearing Officer who can most ably manage cases at this point in the system.

A pre-hearing process that includes ascertaining the parties' estimate of time necessary to hear a case, attempting to set dates to accommodate the calendars of the parties, and calendaring the hearing for consecutive business days until concluded, if possible, would go far in enhancing the timeliness of California's hearing and mediation systems. After a case is calendared through the pre-hearing process, the parties should have the responsibility to notify the hearing office of a change in case status.

The case management process should be intensified close in time to the scheduled hearing to enable the calendar clerk to be in better control of the information on the case status. The utilization of event information such as failure of the parties to provide statutorily required issue statements and evidence packets should be incorporated into the calendaring process.

The Issuance of the Decision

In response to the Questionnaire on the timeliness of the issuance of the decision after the close of evidence, only 50 percent of the parents, 38 percent of the school personnel, 38 percent of the parent representatives and 8 percent of the school representatives responded that the decisions are almost always or often issued in a timely manner. This input is consistent with input obtained through interviews and the public hearing process.

CONCLUSION

Although the timelines in the hearing and mediation systems meet the letter of the IDEA and California State law, they do not resolve disagreements between parents and schools in a timely manner.

There is no consistent protocol in the hearing and mediation systems for case management or a clear designation of anyone in the system who is responsible for ensuring there are no unnecessary delays in cases from the filing of a request for a hearing to the issuance of a decision. Consistent case management could assist in maintaining the momentum of mediation and hearing activity.

(Additional recommendations for case management during the hearing process are included in the Hearing section.)

RECOMMENDATIONS

MEDIATION

Stakeholder Agreement

- The mediation system must maintain a sufficient number of qualified Mediators to ensure mediation can be offered within two weeks of the filing of a request for a hearing. Mediators must be assigned to individual cases on that basis.

Stakeholder Agreement

- The mediation system must include protocols for case management that ensure assigned Mediators actively monitor and manage cases up to the date for the hearing. Regular reports must be submitted on the status of all assigned cases, and the last contact with the parties. Since case management will require additional time allocated for each case, the budget for the mediation system must include consideration of the cost of this requirement at the increased level of qualifications and experience.

Stakeholder Agreement

- The budget for the mediation system must include adequate fiscal support for the cost of these recommendations, including personnel time to facilitate the case management process, taking into consideration the potential for maximizing efficiencies.

G. EFFICIENCY AND EFFECTIVENESS OF THE MEDIATION SYSTEM

Whether settlement occurs in mediation is driven by predicting one's likelihood of success or failure on each issue should the matter go to hearing. Parent Representative

Decisions on going to hearing are based on financial risk management and cost-avoidance. School Administrator

If I had known that mediation was going to be like bartering in the marketplace, I would have approached it differently. Parent of a student with disabilities

FEDERAL AND STATE LAW

The IDEA Amendments of 1997, P.L. 105-17, require every State to provide mediation, at minimum, whenever a hearing is requested. Title 34, Code of Federal Regulations, Section 300.506 includes the requirements for the mediation process itself, the qualifications of the Mediator, the written agreement, location of each session and the confidentiality of the proceedings.

Education Code Section 56500.3 provides for mediation prior to filing a request for a hearing and prohibits attorneys and other advocates from participating. It also provides for the timelines, process of filing, the time and location of the mediation conference and other standards. Education Code Section 56501(b)(2) provides for the right of the parties to a mediation conference during the hearing process and the timelines, including the standards for extensions.

1. SUCCESS: Settlement Rate

INTRODUCTORY REMARKS

There is a general perception in California that the existing mediation system has a resolution rate of over 70 to 90 percent. Even the Master Contractor perceives that the mediation resolution rate is over 70 percent, as evidenced by the Notice of Due Process

Hearing, dated January 2000, sent by the Master Contractor to parties. This general perception was puzzling to this Contractor since the data publicly reported on a quarterly basis by the Master Contractor since 1989 does not substantiate the perception.[42]

It is correct that a small number of hearing decisions are issued every year, as compared to the number of requests for a hearing. In the past five years, an average of only 4 percent of the cases filed go to decision, with the remaining 96 percent of filings for hearing being withdrawn or dismissed for one reason or another.[43]

WHAT THE DATA REVEAL

The following data of mediation success is based on the Master Contractor's definition; that is, those mediation attempts where mediation resolved the dispute and those cases withdrawn or dismissed upon request of the parties after mediation began[44]:

1. The mediation success rate is at an average of 62 percent over the last five years, ranging from a high for two years of 64 percent and a low in one year of 59 percent.

2. This success rate constitutes a decrease in the average success rate of mediation over the previous five years, at an average of 68 percent, ranging from a high in one year of 80 percent and to a low in one year of 60 percent.

3. The most recent Quarterly Reports for July to September 1999 and October to December 1999, show a consistent trend with the success rate reported in July to September as being at 58 percent and the success rate in October to December as being at 60 percent.

4. If those cases where mediation is directly attributed to resolving the dispute are isolated out, the success rate drops to an average of 39 percent over the past five years, which contrasts with an average of 56 percent in the previous five years. (Comparing the differences between the isolated success rate and the overall success rate, it may reflect more active settlement attempts outside of formal

[42] One possible explanation for this confusion may be the general interpretation that the term of art "mediation dispositions" used in the Quarterly / Annual Reports means it was "disposed of" at or through mediation. That is not necessarily the case. The report of data on mediation dispositions includes those cases resolved at or through mediation and those cases withdrawn or dismissed before mediation began and even those cases where mediation was attempted, was unsuccessful and the cases proceeded to hearing.

[43] It must be noted that the available statistics do not allow for the direct correlation of filings to decisions since filings in one year may result in a decision in the following year. However, since this data is examined over a five-year period, the trend is sufficiently reliable.

[44] It should be noted that since the Master Contractor sets all cases for mediation that are not explicitly waived, these statistics are based only on mediation attempts, not settings of mediation which would unfairly include a party declining mediation after receipt of the notice of mediation in the success data. Settings are reported differently in the Master Contractor's Quarterly / Annual Reports.

mediation in the past five years between party representatives, but there is no quantifiable data to substantiate this.)

An intriguing contrast is the trend in the rate of settlement after the hearing has convened. Over the past five years the number of cases settling on or after the first day of hearing have, generally, been increasing every year with a success rate of such settlement of up to 46 percent of the hearings convened. This trend continues in the past two Quarterly Reports, with settlement on or after the first day of hearing at 42 percent in June to September 1999 and 53 percent in October to December 1999.

Although this upward trend in settlement is impressive, it raises the question of why these cases did not settle earlier in the dispute process through the mediation system. The random review of the verbatim electronic record of ten cases during the period of January 1, 1998 to November 30, 1999 revealed only that the Hearing Officers strongly promoted settlement on the first day of hearing and left the parties alone to discuss settlement.

"Settlement is often reached at the last minute because of a desire to avoid the hearing and its costs, not because of an insight or new perception of the problem and its appropriate resolution. Coercion or fear rather than cooperation and collaboration may provide the basis for settlement."[45]

A system that has better success with resolution on the day of hearing, than at mediation itself, is a system focused on resolution too late in the process of disagreement. The Congress intended mediation to encourage the early resolution of problems whenever possible: "The Committee believes that the availability of mediation will ensure that far fewer conflicts will proceed to the next procedural steps, formal due process and litigation, outcomes that the Committee believes should be avoided when possible."[46]

There are other states that report higher success rates in special education mediation. However, due to the different definitions of success state to state, it is difficult to compare California's success rate in mediation to other states. Although the State of Washington has a significantly smaller mediation system, their detailed data and a clear definition of success in their mediation system do provide a base of comparison.[47] Over a five-year period, 695 requests for mediation were received and 345 mediations were held. Resolution of all or some of the issues in dispute was reached in 93 percent of the mediations held. Any cases withdrawn or dismissed after mediation are not included in Washington State's definition of success.

[45] CADRE - *Team Based Conflict Resolution in Special Education*, Supra.
[46] House Report 105-95, p. 106; S. Rep. No. 105-17, p.25 (1997))
[47] Special Education Mediation – *Parents and School Systems Working Together*, Annual Report 1998 – 1999 by Sound Options Mediation and Training Group

2. SUCCESS: Impact on the Relationship

The desire for those involved and supportive of mediation is that the mediation process itself will help relationships and have durability. " . . . Proponents maintain that mediation can reduce the emotional cost of special education disputes . . .Our findings do not support such optimistic views of the benefits of mediation. The traditional focus of research regarding mediation concentrates on the requisites for short-term mediation success: reaching agreement, serving disputant goals, and producing immediate satisfaction. More recent research suggests that parties' viewing the process as fair, and feeling they had an opportunity to voice their concerns are more important to long-term success. These factors are especially important in special education mediation, in which cooperation and trust are essential for the success of long-term relationships."[48]

As evidenced by the results of the Questionnaire in this study and input through the public hearing process, the mediation process itself can hurt the relationship between the parent and the school. The Questionnaire results show that 62 percent of parent representatives and 55 percent of school representatives think the mediation process helps the relationship between the parent and the school, 81 percent of the parents think it hurts the relationship and school personnel are somewhat split with 44 percent thinking it helps the relationship and 36 percent thinking it hurts the relationship. These are important results to consider since delay in the time of resolution will prolong the impact of the system on the relationship and may result in increased personal cost to parents and school personnel.

As noted in the early part of this Report, collaborative problem solving between schools and parents allows disputes to be resolved in a maximized way. There is also a joint-problem solving model / approach to mediation that assumes mutual gain is possible, and that solutions that satisfy mutual interests are more durable:

> "It is known by many names and practices in many variations and settings: Win-Win Bargaining, Mutual Gains, Principled or Interest-Based Negotiation, Interest-Based Problem Solving, Best Practice or Integrative Bargaining. The Interest-Based process is one that is aimed at satisfying mutual interests by consensus and has the ability to go beyond immediate issues to address longer-term interests and concerns."
>
> "Traditional negotiating is often about relative power and the willingness to use it against each other, sometimes at the expense of a better agreement or even the relationship, in order to "win". "The Interest - Based process focuses on the interests underlying the issues, not only on the positions; begins with understanding the problem and identifying the interests that underlie each other's issues and positions."
>
> "When everyone understands the interests and concerns that led a person or group to take a position on an issue, they often find that some of those interests are

[48] Kuriloff and Goldberg, Supra. (Harv. Neg. Law rev.) Pg. 60

mutual, that both sides at the table are trying to achieve the same goal, just taking different approaches. And they frequently discover that what at first appear to be competing interests are not really competing at all. Dealing with each other in this way makes it possible to generate and consider options to satisfy particular interests that may never have been considered before."[49]

There is a plethora of literature on effective strategies, techniques and styles of mediation. A skillful Mediator should be knowledgeable and comfortable with a variety of approaches and have the discretion to employ these approaches based on the nature of the issues and the participants.

This Contractor endorses the following additional recommendations, raised through public input by parents, school personnel and their representatives, to address actual and perceived concerns of fairness, impartiality and good faith, and to preserve the integrity of the mediation system:

1. All appearance of bias must be assiduously avoided;
2. An informed, constant, decision maker with full authority to act must participate at each mediation contact;
3. The focus must remain on the student with disabilities to avoid mediations becoming settlement conferences;
4. The mediation system should accommodate parties, where possible, who reach agreement on the appointment of a Mediator;
5. Mediation must be scheduled as soon as possible;
6. Mediators should actively seek a neutral site conducive to the process for all sessions of mediation;
7. Sessions of mediation must take place in locations where all participants can remain focused and avoid distractions;
8. Mediators must have the skill and training to inform the parties of the state of the law in an appropriate manner;
9. Mediators must actively control the process and constructively manage expressions of anger or tension; and
10. Interim / contingent agreements should be event and time –limited.

RECOMMENDATION

Stakeholder Agreement

- All Mediators must have or acquire the skill to:

[49] Excerpts from: Federal Mediation and Conciliation Service; Brochure: Int. Based Bargaining; See also: Fisher, R and Ury, w. (1991) *Getting to Yes* (2nd. ed) Boston: Houghton Mifflin**;** See also *"The Promise of Mediation"* by Robert A. Baruch Bush and Joseph P. Folger, San Francisco Jossey-Bass, 1994 on the "transformative approach" for another example of a popular model of mediation.

- Select from a spectrum of strategies, techniques and styles applicable to the nature of the issues and the participants;
- Proactively manage the mediation process;
- Assess the prospect of mediation and the affect of delay;
- If parties are represented and willing, attempt to set available dates for the conduct of the hearing if the issue(s) is not resolved at mediation; and
- Assist in the identification of the issues of disagreement early in the mediation process.

3. PREHEARING MEDIATION

WHAT THE DATA REVEAL

The use of prehearing mediation, which provides an opportunity for schools and parents to resolve a disagreement with a State Mediator without filing for a hearing, has dropped over the past five years from 7 percent to 3 percent, as compared to the number of hearing requests. This decrease in the parties' use of a dispute resolution alternative at the same time hearing requests have increased at an average of 8 percent each year over the past five years is of concern.

Three consistent reasons for the relative disuse of this system was provided by public input throughout the study: parents lack of knowledge of the existence of State mediation without filing for a hearing; confusion regarding whether "stay-put" is available during State mediation conducted prior to filing for a hearing; and the prohibition on attorneys and advocates in prehearing mediation.

RECOMMENDATION

Stakeholders Agreement

- In addition to the statutory revisions recommended in Part Three, Section N of this study on "stay-put" and the existing prohibition on the participation of attorneys and advocates, information on the existence of prehearing mediation should be widely disseminated to LEAs and parents of students with disabilities. The characterization of this mediation should not use the term of art in the statute, "prehearing" mediation, since there was input throughout the study process that evidenced confusion on the need to file for a hearing.

4. SHOULD WE BLAME IT ON THE ATTORNEYS?

INTRODUCTORY REMARKS

In the enactment of the IDEA Amendments of 1997, P.L. 105-17, the Congress deferred to state discretion and declined to either require or prohibit attorneys in mediation. "The Committee believes that, in States where mediation is now offered, mediation is proving successful with and without the use of attorneys."[50]

Special education mediations have been analogized to divorce mediation as another legal arena in which emotions run high and children's interests are involved.[51] "Prohibiting lawyers in mediation might make the system less legalistic. It would not, however, address the issue of whether parents, especially poorer parents, need affirmative support when mediating special education disputes. School administrators can call on many more experts in developing their arguments than can the average parent. Given our findings, the elimination of lawyers from the mediation process would seem to tilt the balance of power too much in favor of schools."[52]

"While special education mediation eliminates most of the trappings of due process hearings, we found that having an attorney...had a positive association with parent's perceptions of the fairness of mediation, of the agreement reached through it, and of its implementation...This result suggests that by the time parents reach mediation, having an attorney -one element that is central to procedural due process -may be necessary for the parties to achieve a sense of fairness."[53]

WHAT THE DATA REVEAL

On an average over the past five years, at the time of a request for a hearing or mediation, parents have had the representation of attorneys or advocates 58 percent of the time and school personnel have had such representation 27 percent of the time. An examination of 26 case files that were opened and closed in one year and 15 case files open longer than one year, revealed that the involvement of an attorney is not necessarily the reason cases are delayed.

In response to the Questionnaire, school personnel think you do not need a lawyer to represent your interests in the mediation process, but the majority of parents, school and parent representatives think you do. School personnel, by just 50 percent, think that attorneys inhibit the settlement of disagreements, but 32 percent of their colleagues think

[50] House Report 105-95, p. 106; S. Rep. No. 105-17, p.25 (1997).
[51] Steven S. Goldberg and Peter J Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 Exceptional Children 546 (1991).
[52] Kuriloff and Goldberg, Supra. (Harv. Neg. Law rev.) Pg. 63; Citing Craig A McEwen, et.al., *Being in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Review 1317, 1395 (1995)).
[53] Kuriloff and Goldberg, Supra. (Harv. Neg. Law rev.) Pg. 61 Citing Pruitt and Carnevale.

that the presence of attorneys cannot be generalized. In contrast, 44 percent of parents think that the presence of attorneys promotes the settlement of disagreements. An examination of cases with mediation success from July 1998 through December 1998 revealed that cases in which attorneys or advocates represented parents settled at a slightly higher rate than cases in which the parents are unrepresented.

CONCLUSION

This Contractor believes that the impact of attorneys in mediation is fundamentally a question of the knowledge and skill of the Mediator. If Mediators have the requisite knowledge of special education law and program and the skills to maintain the balance of power between the parties and to actively assist each party to work toward a satisfactory agreement, then the presence of an attorney or other representative can be helpful to reaching agreement.

The review of literature on the subject of the non-adversarial nature of special education mediation would also support the training of attorneys in interest-based negotiation. [54] Generally, attorneys have training and experience in positional bargaining, whereas mediation depends on cooperative and integrative decisions. If the CDE implements the agreed upon recommendation to the access of information on the hearing and mediation systems in Part Two of this Report, it is recommended that the various models of mediation be included in the training.

H. EFFECTIVENESS AND EFFICIENCY OF THE HEARING SYSTEM

These special education hearings are "cowboy law." School Representative
"It is like the "Wild Wild West". Parent Representative

These administrative hearings are the only ones by the 'seat of your pants'. The hearing is your discovery. Open the process up so all the evidence is clear before the hearing. Do away with gamesmanship. School Representative

There is a fluidity of process. These hearings are like "jello on a tree". School Representative

There is a procedural comfort zone. Efficiency must not compromise justice. Parent Representative

[54] Kuriloff and Goldberg, Supra. (Harv. Neg. Law rev.) Pg. 63 Citing Christopher W. Moore, *The Mediation Process 2d edition* 1996; See also FT Steven S. Goldberg and Kathleen Kelley Lynch, *Reconsidering the Legalization of School Reform: A Case for Implementing Change Through Mediation,* 7 Ohio St. J. on Disp. Resol. 199(1992); Marc Howard Ross, *The Management of Conflict* (1993)

Most attorneys want a rule-based process. There is a need to strike a balance in these hearings. School Representative

There is no reason why a due process hearing should take five, ten, fifteen or twenty days ...when a complicated anti-trust matter can be completed in less time. School Representative

Every unnecessary witness that shows, costs. Every unnecessary piece of paper that is submitted, costs. Every unnecessary motion costs. School Representative

There is a procedural comfort zone. Efficiency must not compromise justice. Parent Representative

Most attorneys want a rule-based process. There is a need to strike a balance in these hearings. School Representative

INTRODUCTORY REMARKS

"Separate from any justice they may produce, hearings seem to have large personal and transactional costs".[55] The results of the Questionnaire show that over 80 percent of parents, school personnel and school representatives believe the hearing process hurts the relationship between the parent and the school. Only 48 percent of parent representatives think the hearing process hurts the relationship, with the other respondents split between it helping or having no significant impact on the relationship. Delays and inefficiencies in the hearing system only prolong the impact of the system on the student with disabilities and the relationship between the parent and the school, and may result in increased personal cost to parents and school personnel, including attorney fees and costs of expert witnesses, and the expenditure of time.

FEDERAL AND STATE LAW

The IDEA provides: the basis for a request for a hearing; the requirements of notice of the matters of disagreements; the requirements of an impartial Hearing Officer; the rights of the parties; the student's status during the proceedings; the timelines for the decision; the location of the hearing; and provisions of finality and appeal to court. (20 U.S.C. §1415; 34 C.F.R.§§300.507 et seq)

The Education Code and Title 5, California Administrative Code, add additional requirements, including: the requirement that the CDE contract with a single nonprofit organization or entity to conduct the hearing and mediation system; a 10-day notice requirement of the issues to be decided at the hearing; a requirement of a notice of representation by an attorney; additional qualifications for Hearing Officers and areas of authority; standards for continuances and the right of the parties to take a hearing "off

[55] CADRE - *Team Based Conflict Resolution in Special Education*, Supra.

calendar" if they agree to mediate; evidentiary standards, additional rights of the parties related to the conduct of the hearing; and the incorporation of, and exception to, specific requirements in the Administrative Procedure Act, Government Code Section 11500 et seq.

1. PRE-HEARING PROCESS

WHAT THE DATA REVEAL

California's pre-hearing process is designed primarily around a "law and motion" practice. This practice requires written motions from a party on preliminary substantive and procedural matters prior to the first day of the hearing and written rulings, which may merely be a minute order included in the case file. The requests for rulings on motions have become a burgeoning practice, increasing over 100 percent over the past five years. In 1989 - 1990, the proportion of motions to requests for hearings was at .02 percent. In 1998 - 1999, the proportion of motions to requests for hearing had increased to 44 percent. This trend continues with a proportionate average of 69 percent over the most recent two quarters.

There are no overall written standards or procedures for the law and motion practice. A common request through public input was the need for standards, procedures and timelines for submitting, responding and ruling on motions.

Parents, school personnel, and parent and school representatives with extensive involvement in the process who responded to the Questionnaire overwhelmingly think that the current pre-hearing process is not sufficient to focus hearings and to resolve preliminary issues ("law and motion"). In response to the Questionnaire's focused prehearing questions, all categories of respondents think parties should know before the first day of the hearing what day and, generally in what time block, they can expect to begin and end their case; that anticipated scheduling conflicts for witnesses should be generally resolved sufficiently before the hearing; and that parties should be generally encouraged before the hearing to attempt to reach agreement on things such as uncontested educational history or the qualification / experience of certain witnesses.

Public input throughout the study reiterated the absence of the clear identification of the specific issues of disagreement until the first day of hearing. The Master Contractor acknowledges that one third of the issues are "redefined" at the hearing or in the decision itself. Another consistent comment was that the morning of the first day of the hearing was used for settlement discussions and procedural matters such as the submission of documentary evidence and the scheduling of witnesses. A random sample of ten electronic verbatim records for hearings conducted and decisions issued between January 1, 1998 and November 30, 1999, confirmed this input. In one case, the identification of

the issues took up to 3:00 p.m. on the first day of the hearing. The first day of the hearing is simply too late in the process to identify the issues and address pre-hearing matters.

The results from the examination of case files are corroborated by the Questionnaire results. The majority of all categories of respondents to the Questionnaire asserted that both parties are not generally clear on the precise issues of disagreement ten days before the hearing.

If the issues are not clearly defined prior to the statutory disclosure five business days prior to the hearing, the parties cannot be certain what witnesses should be called and what evidence should be submitted. Parties' lack of clarity on the scope of the hearing also raises questions of procedural fairness, encourages overbroad exchange of evidence and evaluations, irrelevant submission of evidence, and a waste of resources, including time in preparing for the hearing and the time of the witnesses and the parties and any representatives on the first day of the hearing. The absence of a clear statement of issues also impacts the complaint process since the IDEA provides that the CDE must set aside any part of a complaint that is being addressed in the hearing.
(34 C.F.R.§300.661(c))

The results of the Questionnaire reveal that the majority of school personnel and school representatives think that the requesting party's issues of disagreement should be set and unchangeable at a point in time before the hearing. In contrast, however, respondent parents and parent representatives disagree that the issues should be set and unchangeable.

This Contractor does think the issues that determine the scope and jurisdiction of the Hearing Officer must be clearly defined and set sufficiently prior to the hearing to provide notice to both parties and allow the hearing to proceed in an orderly and efficient manner. Whether an issue may be changed on motion, after that point in time, is a matter for a skilled Hearing Officer who should weigh factors such as whether the circumstances with the student has changed, prejudice to the responding party, delay in the adjudication of the stated issue, and delay in adjudication of the added issue by requiring a new proceeding.

In order to address pre-hearing matters such as those raised in the preceding discussion, there are a number of other states that employ a prehearing conference to resolve preliminary matters in special education hearings. These states include Arkansas, Massachusetts, Washington, New Jersey, Florida, Nevada, Virginia, Hawaii, Arizona, and Iowa.[56]

[56] Typical of state administrative procedures acts, California's administrative adjudication provisions of the Administrative Procedures Act (Government Code §11511.5; Title I, California Administrative Code, Section 1026 provide authority to the administrative law judge, on motion of a party or by order of the administrative law judge, in formal hearings to require a prehearing conference. The Regional Center Lanterman Act Fair Hearings administered by the Office of Administrative Hearings has incorporated a prehearing conference in the hearing procedures.

CONCLUSION

The current pre-hearing process is insufficient to address preliminary procedural issues in an efficient and effective manner.

RECOMMENDATIONS

Stakeholder Agreement

- The hearing system must include a pre-hearing process whereby the Hearing Officer, upon his or her own motion or upon the request of either party, can direct the parties to engage in a prehearing conference. This pre-hearing process would be initiated after mediation or upon the waiver of mediation.

Stakeholder Agreement

- The pre-hearing process, including the prehearing conference, must be equitable for unrepresented parties.

Stakeholder Agreement

- The pre-hearing process may include multiple conferences; however, it is preferable that the Hearing Officer who will preside at the hearing address matters relating to the conduct of the hearing in the prehearing conference.

Stakeholder Agreement

- The budget for the hearing system must include adequate fiscal support for the cost of this recommendation, including personnel time to facilitate the pre-hearing process, taking into consideration the potential for maximizing efficiencies.

Stakeholder Agreement

- The pre-hearing process must address the following, if appropriate, and any other matters to promote the orderly conduct of the hearing:

    - If either party is unrepresented, ascertain if the party will be represented at the hearing and obtain contact information. Inquire whether the parent has received a copy of his or her rights, including notice of any free, or low cost legal services that are available;
    - The identification of the precise issues that will be heard;
    - A determination whether it is an expedited hearing on discipline under the IDEA;
    - Ascertain the parties' estimate of the time necessary to hear the case;

- Attempt to set dates to accommodate the calendars of the parties, and calendar the hearing for consecutive hearing days, if possible;
- Consider the number of witnesses and the possible redundancy of testimony;
- Resolve any witness scheduling problems that may be anticipated;
- Discuss whether any continuances of the hearing timeline are anticipated, the procedures for requesting a continuance, and the standard for granting a continuance;
- Ascertain if there are any pre-hearing disputes such as jurisdiction and stay-put, that might require pre-hearing briefing or evidence and set dates and procedures for submitting arguments and deciding such motions;
- Inform the parties of how the hearing will be conducted, who will have the burden of going forward and who will have the burden of proof on each issue;
- Determine whether there is a need for an interpreter or special accommodation at the hearing;
- Determine whether the parent will open the hearing to the public;
- Establish the rules for the submission of documentary evidence, and remind the parties that the witness list must include the general nature of the witnesses' testimony;
- Particularly where the parties are represented by counsel, encourage the submission of joint exhibits, stipulations to admissibility and expertise of witnesses, and a list of agreed upon facts;
- Inform the parties of the dates required to meet the five business day rules for the disclosure of documentary evidence, evaluations and witness lists, including general area of testimony, and of the requirement to submit the evidence, evaluations and witness lists to the Hearing Officer pursuant to Education Code Section 56505.1(f); and
- Ascertain whether the parties are interested in attempting mediation, and encourage them to consider the option of mediation as an alternative to hearing. (Education Code Section 56505(d))

Stakeholder Agreement

- ❑ The prehearing conference may be conducted by telephonic or other electronic means consistent with Title 5, California Administrative Code, Section 3082(g). After the prehearing conference, the Hearing Officer must issue a written prehearing order that incorporates the matters determined at the conference.

Stakeholder Agreement

- ❑ The pre-service and in-service training for Hearing Officers must include skill development in the conduct of the pre-hearing processes and the hearing itself,

including the extent and proper exercise of the authority of the Hearing Officer in determinations of relevancy and other evidentiary efficiencies.

Eleven of the eighteen Stakeholders advocate for the Hearing Officer's explicit or inferred authority to limit the number of days allowed to conduct the hearing on a case-by-case basis. This Contractor recommends that justice is better served by addressing inefficiencies in the current conduct of the hearing through an effective pre-hearing process and the proper exercise of the authority of the Hearing Officer to limit irrelevant, redundant or cumulative testimony and/or documentary evidence.

2. DISCLOSURE - Avoid Surprise

Where parties are represented, the Hearing Officers do not search for truth; it is a battle of experts. School Representative

WHAT THE DATA REVEAL

Education Code Section 56505(e)(7) clearly requires the list of witnesses disclosed five business days before the hearing to include the general area of testimony that the party intends to present at the hearing. The random review of case files in this study revealed that this provision of mandatory disclosure is not routinely followed in a meaningful manner.

To ensure the hearing system remains a truth-seeking process and to avoid these administrative hearings devolving to a "battle of the experts", this Contractor recommends the Hearing Officer include in the prehearing conference a thorough discussion of:

- The expectation that the parties will abide by the letter and spirit of the IDEA disclosure requirement which was intended to avoid surprise by either party at the hearing; [57]
- The requisite degree of specificity and the authority of the Hearing Officer to bar undisclosed testimony pursuant to Education Code Section 56505;
- The time and place for the timely production of documents sought through a subpoena duces tecum;
- The parties' intended use of expert witnesses and the purpose, the requisite degree of disclosure of the general area of the experts' testimony and evaluations and recommendations, the encouraged disclosure of resumes and a statement of

[57] Federal Register/Vol. 64. No. 48/Friday, March 12, 1999/Rules and Regulations-Analysis of Comments, pg 12614.

written treatises, where appropriate, and stipulations on the admissibility and expertise of the witness.

To date, the hearing system has only employed the use of Education Code Section 56505.1(b) on the authority to request that, with the consent of the parties, conflicting experts witnesses discuss an issue on the record on two occasions. This unique California statutory provision provides an excellent tool in the hands of a skillful Hearing Officer. The training of Hearing Officers should include the effective use of this provision and the provision regarding testimony by electronic means pursuant to Title 5, California Administrative Code, Section 3082(g).

If the current trend of the increased use of expert witnesses revealed by some party representatives anecdotally through this study is verified by the CDE or Master Contractor in the future, the CDE, Master Contractor and parent and school representatives are encouraged to consider:

- Whether the implementation of the prior disclosure rules provide sufficient disclosure of expert's resumes, treatises, assessments and recommendations to allow for the full disclosure warranted in a truth-seeking process; and
- The admissibility of expert witnesses' written reports in a way that is fair to the opposing party and not cost prohibitive, such as the desirability of a provision consistent with Government Code Section 11514 on the testimony of experts by affidavits and/or the consideration of an exception to the hearsay rule to allow for the admissibility of a written expert's report due to its heightened reliability.

RECOMMENDATIONS

Stakeholder Agreement

- The pre-hearing process must include direction to the parties on the required level of specificity for meaningful disclosure of the witnesses that the parties intend to present at the hearing and their general area of testimony. (Education Code Sections 56505 (e)(7))

Stakeholder Agreement

- The pre-hearing process must include direction to the parties on the required notice to the other party of any requested subpoena or subpoena duces tecum and the procedures, including the timelines, to submit a motion to quash (suppress) any subpoena or subpoena duces tecum. (Title 5, California Administrative Code, Section 3082(c)(2))

Stakeholder Agreement

- Hearing Officers must be trained in the judicious use of the authority to order an independent educational evaluation and call witnesses as independent medical

specialists pursuant to Education Code Section 56505.1(e) and (g). The budget for the hearing system must include consideration of the cost of this recommendation.

3. CLOSING ARGUMENTS AND BRIEFS

WHAT THE DATA REVEAL

The submission of closing arguments and written briefs has become a common practice in the hearing system, with the number of pages, line and font being issues for negotiation at the close of the conduct of the hearing. A review of randomly selected cases that included the submission of written closing arguments and briefs between January 1, 1998 and November 30, 1999 ranged from allowing eighteen days to fifty-three days to submit briefs after the conduct of the hearing. The brief business is burgeoning, which increases attorney fees, and the timeliness of the decision.

Several Stakeholders expressed concern that the exercise of the Hearing Officer's discretion on the desirability of written closing arguments and briefs be determined based on some uniform standards to provide predictability for the parties and to ensure the careful exercise of this discretion. This Contractor recommends that the Master Contractor in consultation with parent and school representatives consider some non-binding guidelines for the Hearing Officers' exercise of this discretion. Factors such as the complexity of the issues, the number of witnesses, the presence of interagency issues, gaps in hearing days, whether one or all parties request the submission, and the impact of the Hearing Officer's determination should be considered in the development of such guidelines. Any guidance provided by a Hearing Officer to parties on the parameters of written briefs and argument should consider the impact of expedited hearings, and should not limit the parties' ability to address evidence admitted, including the testimony of witnesses, and legal issues raised by the issues and evidence.

RECOMMENDATION

Stakeholder Agreement

- Hearing Officers must judiciously exercise their discretion on the determination of the desirability of the parties' submission of written closing arguments and briefs, and communicate this determination as early as possible in the conduct of the hearing. If the Hearing Officer determines written closing arguments and briefs are desirable, the Hearing Officer should provide guidance to the parties, including the date necessary to receive closing arguments and briefs for the timely issuance of the decision, the length of the briefs, and the desired areas of focus.

4. DECISIONS

FEDERAL AND STATE LAW

Both parties to a hearing have a right to obtain a written, or electronic at the option of the parents, findings of fact and decisions. Unless specific extensions of time are granted, not later than 45 days after the receipt of a request for a hearing, a final decision must be reached in the hearing and a copy of the decision mailed to each of the parties. (20 U.S.C. §1415; 34 C.F.R. §§300.509(a)(5) and 300.511(a)) Education Code Section 56505(f) explicitly adds the requirement of a reasoned decision.

WHAT THE DATA REVEAL

Hearing Officers reported that the absence of dedicated writing time for consecutive periods was the major cause of their delay in the issuance of decisions. Lack of timely decisions has a detrimental affect on the student with disabilities, if the current placement does not provide an appropriate education. It also affects the continuing impact of the system on the relationship between the school and parent, the cost of attorney's fees and related administrative hearing costs, including the costs for retroactive services and placement.

With due consideration of the laudatory remarks of the Ninth Circuit Court of Appeals and appropriate caution, this Contractor recommends that the Master Contractor review the format and development of the hearing decisions relative to the extensive and time-consuming practice, in at least some decisions, of summarizing all evidence admitted (differentiated from the necessary Findings of Fact and Conclusions of Law), the design of remedies, the appropriate level of specificity of orders, and the occasional practice of remanding parties to convene an IEP meeting to incorporate the clear terms of a final decision and order.

RECOMMENDATIONS

Stakeholder Agreement

- The hearing system must provide for regular periods of consecutive writing time for Hearing Officers close in time to the conduct of the hearing and the close of the record. The budget for the hearing system must include consideration of the cost implications of this recommendation.

Stakeholder Agreement

- A topical and comprehensive index of the hearing decisions and orders should be publicly available. Although the hearing decisions are not precedent decisions, it would be helpful for the parties to be able to easily access the decisions rendered

on various issues. The existence of such an index may actually avert filings and/or facilitate mediation. The budget for the hearing system must include consideration of the cost of this recommendation.

F. ORDERLY AND RESPECTFUL CONDUCT OF THE PROCESS

FEDERAL AND STATE LAW

Title 5, California Administrative Code, Section 3088 incorporates the provisions of the Administrative Procedures Act, Government Code Sections 11455.10 to 11455.30 authorizing contempt sanctions for specific grounds including disobedience or resistance to a lawful order, obstruction or interruption of the proceeding and disorderly, contemptuous, or insolent behavior toward the Hearing Officer. The Hearing Officer may order a party or representative to pay reasonable expenses incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. Section 3088 provides the following exceptions: a party is not allowed to initiate contempt sanctions or place expenses at issue and the General Counsel of the CDE must approve the contempt sanctions prior to initiation.

There is no comparable provision in the IDEA.

WHAT THE DATA REVEAL

Public input was provided through the study process on the absence of a system of certification for professional representatives, the need for a continuum of sanctions short of judicial action, and the cumbersome nature of the current sanction provisions in Title 5, California Administrative Code, Section 3088.

RECOMMENDATIONS

Stakeholder Agreement

- The Master Contractor, with the involvement of parent and school representatives, should develop recommendations to the CDE for sanctions for failure of a party representative to act in a professionally appropriate and constructive manner in special education mediations or hearings.

- The development of the recommendations should include consideration of:
  - A continuum of sanctions including suspending and/or barring a party representative from appearing in these proceedings for a period of time;
  - The efficacy of the process requiring CDE's prior approval (Title 5, California Administrative Code, Section 3088); and

- The efficacy of the existing prohibition on a party's initiation of contempt sanctions. (Title 5, California Administrative Code, Section 3088)

G. EXPEDITED HEARINGS

FEDERAL AND STATE LAW

The IDEA Amendments of 1997, P.L. 105-97, provided new authority and requirements in the area of discipline for a student with disabilities. The Education Code was not revised consistent with the IDEA to provide:

- Clear statutory language regarding the Hearing Officer's authority to order a change in the placement of a student with disabilities to an appropriate interim alternative educational setting for not more that forty-five days if maintaining the current placement of the student is substantially likely to result in injury to the student or others; and
- School personnel's authority to order the removal of a student with a disability to an appropriate educational setting if the student carries or possesses a weapon to or at school, on school premises, or to or at a school function; or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function. (20 U.S.C. §1415(k)(1) and (2); 34 C.F.R. §§300.520(a)(2); 300.521; 300.525 and 300.528)

WHAT THE DATA REVEAL

Public input and documentation was provided through the study process of the conflict with State law in the area of the authority of the Hearing Officer to place students with disabilities in an interim alternative educational setting, and the exercise of this authority through an expedited hearing. No documentation was provided on the purported position of the CDE that pursuant to Education Code Section 48915.6, school personnel do not have the authority to place students with disabilities in interim alternative educational settings with regard to drugs, controlled substances or weapons. However, this issue must be clarified by the CDE to ensure the authority of school personnel in this area is clear and not unnecessarily restricted by administrative interpretation.

RECOMMENDATIONS

Stakeholder Agreement

- The California Education Code should be revised to clearly provide for an expedited hearing if a parent of a student with disabilities requests a hearing on the LEA's determination that the student's behavior was not a manifestation of

the student's disability or with any decision regarding placement under the discipline procedures consistent with the IDEA. (34 C.F.R. §300.525)

Stakeholder Agreement

- The California Education Code should be revised to provide for authority consistent with the IDEA to allow a Hearing Officer, in an expedited hearing, to order a change in the placement of a student with disabilities to an appropriate interim alternative educational setting if maintaining the current placement of the student is substantially likely to result in injury to the student or others. (34 C.F.R. §300.521)

Stakeholder Agreement

- The budget for the hearing system must include consideration of the cost of expedited hearings.

H. PROTOCOLS AND MANUALS

WHAT THE DATA REVEAL

The Master Contractor for the hearing and mediation systems provides a "Notice of Procedural Safeguards" which provides some overall information and procedures on the systems in an explanatory question and answer format. However, California does not have a manual for Hearing Officers and/or a common core of written procedures on the resolution of pre-hearing matters and the conduct of the hearing.

Throughout this study, parents repeatedly provided input that there is a void of information on the mediation and hearing systems. This void merely increases the level of parents' anxiety and stress, and reinforces the thinking that you need a representative to guide you through the process. Such documents should be publicly available to be of assistance to parties, and may facilitate their access to the system without engaging a representative. It would also provide guidance to new Hearing Officers and party representatives and provide a degree of consistency and predictability in the conduct of the hearings.

California also does not have a manual for mediators and/or a common core of written procedures on the conduct of mediation. There is a need for at least some written protocols to prepare parties for the mediation process, and to communicate ways to enhance the success of mediation such as ensuring all parties or party representatives are authorized to agree to a final resolution. (The Mediation Coordinator has recently commenced the compilation of protocols for Mediators.)

RECOMMENDATIONS

Stakeholder Agreement

- A hearing and mediation manual or common core of procedures should be developed for Hearing Officers and Mediators on the pre-hearing process, the conduct of a hearing and the conduct of mediation. Where necessary, standards such as what constitutes good cause for a continuance, the burden of proof and the burden of going forward; the standards for telephone testimony or other requirements relating to the body of procedural safeguards that may constitute "underground regulations" must be proposed as revisions to the Education Code or Title 5, California Administrative Code.

Stakeholder Agreement

- The Master Contractor must develop the manuals/protocols or regulatory or legislative proposals in consultation with parent and school representatives. The manuals/protocols must be made publicly available to parents and LEAs and their representatives.

- The budget for the hearing and mediation systems must include consideration of the cost of this requirement.

I. EQUAL ACCESS

FAPE means being willing to cut your income in half to advocate for your child. Parent

Parents tell me that the only time they are treated with respect by the school district is when they are accompanied by an advocate/attorney. Parent Representative

There is an inevitability of the system. Parents who are unrepresented, lose. Parent Representative

INTRODUCTORY REMARKS

The hearing and mediation systems must be easily accessed, which requires the availability of information and responsiveness to diverse populations and unrepresented parties, and the ability of parents to engage a representative if they want representation at a hearing or mediation. In California, the hearing system is not perceived as a system parents or schools can access without an attorney. Parents do not perceive the mediation system as one they can access without an attorney.

WHAT THE DATA REVEAL

1. Access Without an Attorney?

Ninety percent of parents and 88 percent of school personnel responding to the Questionnaire think you need an attorney to represent your interests in the hearing system. Throughout the public hearing process, parents reiterated the perception that California's hearing system is not a system a parent can access without an attorney. This perception exists despite the concurrent public input of Hearing Officers' significant attempts at the time of hearing, to accommodate the needs of unrepresented parents. Over the past five years for those cases that result in a decision, school personnel have used an attorney or advocate on the average of 74 percent of the time and parents have used an attorneys or advocate 66 percent of the time. (Based on this Contractor's experience, the use of an attorney or advocate by a LEA when a parent is unrepresented is not a typical practice in other states.)

Even parents who access the system have reported a void of information and assistance for parents without the ability to pay for representation. Those who can pay have a hard time getting representation due to the small numbers of attorneys and advocates who practice in special education law. This fact becomes even more meaningful when considered in light of the data that between April 1995 and December 1997, unrepresented parents were successful only 12 percent of the time when they participated in a hearing.

Anecdotally, several school attorneys informed this Contactor through study interviews that a typical special education hearing will cost the LEA between $20,000 - $35,000 in their attorney's fee alone, if they prevail. The comments of school personnel throughout this study reiterated a theme consistent with the comments obtained in a survey conducted in 1990 by the National School Boards Association of School Attorneys: "Settling is a 'matter of economics' - it is not about appropriateness." and "High attorney's fees lead some schools to compromise."[58]

This same financial dilemma exists for parents of students with disabilities who are unable to find an attorney willing to take the case on a contingency basis. Some parents reportedly have gone to extraordinary lengths to obtain representation, including accepting a lien on their house. That parents and schools must weigh the fiscal feasibility of pursuing a sincere educational proposal is troubling, in a system designed to resolve disagreements between a student with disabilities' two advocates: his parents and school personnel.

[58] American School Board Journal, December 1990.

2. Diversity of Access

Dispute resolution models, including hearings, are often assumed to be culturally neutral and applicable across contexts. However, any conflict resolution process is embedded with culture. "The 'typical' mediation model is founded on implicit cultural assumptions that are often invisible to the mediator or mediators and any participant that share that culture."[59]

The special education hearing and mediation systems must be appropriate and responsive to all of the participants. To ensure that all families of students with disabilities have access to the mediation and hearing systems, procedures and policies must in place that are responsive to a broad spectrum of cultural, linguistic and economic differences. For example, the mediation model may not a familiar process for much of the public. Any activity, institution, or process that is unknown or unfamiliar is less likely to be used than one that is familiar and customary. "If school systems are going to meet the increasing challenge to implement culturally competent systems of services, they must include collaborative dispute resolution strategies that respect diverse methods of handling conflicts. In particular, the goal must be to provide the type of mediation services which will be truly acceptable to all people and, therefore, accessible"[60]

Nationally, there is a large socioeconomic distinction between parents who access the special education mediation and hearing systems and those who do not. It is generally acknowledged that families who use procedural safeguards to resolve educational disputes are typically highly educated and from middle or upper class backgrounds. The systems are generally not viewed as accessible or responsive to families from culturally, economically and linguistically diverse backgrounds.[61]

An examination of California's public school enrollment statistics for 1998 - 1999 reveals that 62.2 percent of the students in kindergarten through twelfth grade have an ethnic designation of other than white. Thirty-seven percent of the students in kindergarten through twelfth grade have a primary language that is other than English.

Unfortunately, the only data available in California on the participation of families with children with disabilities from culturally, economically and linguistically diverse backgrounds in the mediation and hearing systems are anecdotal from school personnel, parent representatives, Hearing Officers and Mediators. The majority of this anecdotal information reflects the national perception that the mediation and hearing systems are not available to all families. There is a need for California to collect data on the access of families of varying income levels, ethnic composition and linguistic diversity to the hearing and mediation systems.[62]

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[59] *Keys to Access* CADRE Supra.
[60] *Keys to Access* CADRE Supra.
[61] *Keys to Access* CADRE Supra.
[62] This recommendation for data collection is consistent with the recommendation for the compliance system in *Improving Special Education Through Compliance* -: Final Report of the Assembly Bill 602 Workgroup to the Legislature and the Governor, March 1999, Pp. 38 and 42.

Some parents, school personnel and their representatives recommended through the study process that public representation should be available to parents of students with disabilities. The support for this recommendation was based on equal access to the hearing and mediation systems, predictable fees for representation and the availability of a sufficient number of attorneys knowledgeable in special education law. Although there would clearly be a cost at the state level, the availability of public representation may reduce attorney fees paid by LEAs for individual cases or, at minimum, provide predictability in costs.

This concept of offering public representation is not unprecedented in California. There is currently a contractual agreement between the Department of Developmental Services and Protection and Advocacy, Inc. to provide clients' rights advocacy services to individuals with developmental disabilities who are consumers of regional centers. The advocacy services program is required to meet the individual needs of the consumers, and be culturally and linguistically appropriate to the multicultural diversity of the consumers and their families. The scope of services includes asserting and protecting the rights of persons with developmental disabilities; maintaining a toll free/TTY/TDD 800 telephone line to provide information to consumers requesting assistance for clients' rights advocacy services; assisting consumers in obtaining and understanding procedures for initiating hearings, including direct representation; and providing clients' rights training and self-advocacy training.

3. Unrepresented Parents and the System

Parents and school personnel who may elect to participate in the system without representation should also have access to information and assistance. Except for a manual for parents on special education rights and responsibilities prepared by two advocacy organizations and the description of the process provided by the Master Contractor, there is currently a lack of public information on the hearing and mediation systems. This void contributes to the mystique of the hearing and mediation systems, and the assumption that parents cannot adequately represent their child in these systems.

The hearing and mediation systems must continue to be systems that parents and school personnel can access without representation. No inference should be made from the recommendations in this Report, that the development of procedures such as a prehearing conference and standards can be allowed to create an obstacle for unrepresented parties to access and participate in hearings and mediations without representation, if they choose. Quite the opposite, pre-hearing processes and publicly available standards should assist parents in accessing and understanding the systems.

Training and information should be available to allow parties to proceed without representation and the training of the Mediators and Hearing Officers must include skill development on the conduct of a mediation or hearing with one or more unrepresented parties. The development of any manuals or protocols and standards in areas such as

expert witnesses (see the "disclosure" discussion in this Part) must consider the clarity of the writings, the impact on unrepresented parties and the fairness to both parties, and must promote access to parents with limited fiscal resources.

CONCLUSION

Stakeholder Agreement

- Anecdotal information raises the likelihood that California's hearing and mediation systems are not accessible to families from culturally, economically and linguistically diverse backgrounds. (It should be noted that the current hearing and mediation systems do provide interpreters, where necessary.)

RECOMMENDATIONS

Stakeholder Agreement

- Information must be widely available to both parents and school personnel on the hearing and mediation systems.

- Additional data must be collected to determine if the anecdotal information on the absence of equal access is accurate. If there is not equal access to all families of students with disabilities to the hearing and mediation systems, resources, procedures and policies must be established that provide equal access and are responsive to a broad spectrum of cultural, linguistic and economic differences.

The Stakeholders are **not**, however, in agreement on how to afford all families of students with disabilities equal access to the hearing and mediation systems if unequal access is verified.

This Contractor recommends that the CDE request further study of this issue by the Legislative Analyst's Office or other appropriate body or individual. If unequal access is verified, this Contractor offers the following for consideration as a time-limited pilot program with evaluative components:

- A grant to a private, nonprofit agency or agencies and/or the establishment of a collaborative of attorneys with agreed upon fees for public representation who meet specific selection criteria; and/or
- A grant to a private, nonprofit agency or agencies to provide information and assistance to parents and school personnel in the framing of issues and preparing for mediation and hearing.

J. SINGLE ENTITY

Coordination and consistency with regard to the interpretation of the law would best be facilitated by a single agency implementing both hearings and mediation. Non-education State agency representative

Stakeholder Agreement

- The California Education Code currently requires the CDE to contract with a single, nonprofit organization or entity to conduct mediation conferences, including prehearing mediation, and hearings. (Education Code §§56500.3(d) and 56504.5)

- Even if the State law is revised to authorize the CDE to contract with multiple statewide or regional entities to conduct the State hearing and mediation systems:

  - The administration of California's mediation system separate from the hearing system would require multiple infrastructures, and may cause other cost inefficiencies, including an increase in attorney fees. It would also require the coordination of timelines, and some additional level of coordination to ensure a consistent knowledge of special education law.

  - The administration of California's hearing system or the mediation system, once a hearing request is filed, by multiple entities on a regional basis raises serious legal issues and administrative concerns, including redundant infrastructure and other costs, consistency, and the ability of the CDE to exercise its general supervision responsibilities under the IDEA. (20 U.S.C. §1412(a)(11); 34 C.F.R. §300.600)

  - The administration of a State mediation system prior to filing for a hearing as a separate entity or entities from the State hearing and mediation systems also raises redundant infrastructure and other costs, as well as issues of consistency and standardization. Although it does not raise the same level of concerns regarding the CDE's general supervision responsibilities under the IDEA, it does raise the risk of denying or delaying the right of the parties to a hearing.

RECOMMENDATIONS

Stakeholder Agreement

- Even if State law is changed to authorize CDE to contract with more than one entity to administer the State mediation and hearing systems, it is recommended that the CDE first consider changes proposed in this Report within the existing

contractual structure of a single entity. The administration of the mediation and hearing systems through a single entity avoids unnecessary fiscal expenditures and problematic concerns relating to general supervision, particularly with regard to consistent interpretations of the law.

Stakeholder Agreement

- Even if State law is changed to authorize CDE to contract with more than one entity to administer the State mediation and/or hearing systems as regional systems, it is not recommended due to the serious implications administratively and legally.

Stakeholder Agreement

- Even if the State law is revised to authorize the CDE to contract with multiple entities to administer the mediation system prior to filing for a hearing, it is not recommended due to the administrative inefficiencies and other concerns.

K. CDE AND THE HEARING AND MEDIATION SYSTEMS

1. PERCEPTION

There is a public perception among some parents and parent advocates of the improper influence of the CDE on the hearing and mediations systems. This perception is of concern since the integrity of a hearing and mediation systems are dependent on not only actual fairness but also perceived fairness.

RECOMMENDATION

Stakeholder Agreement

- In fulfilling its general supervision responsibilities under the IDEA in the administration of the hearing and mediation systems, the CDE should ensure the hearing and mediation systems are protected from improper influence, or even the appearance of impropriety.

2. CONTRACT MANAGER

From 1989 to 1998, the CDE's Legal Office served as the contract monitor for the special education hearing and mediation systems. In March 1998, the Special Education Division became responsible for managing and monitoring the contract. Historically, the

CDE contract manager has not been consistently involved in the ongoing management of the contract or as a participant in the advisory committee activities.

Due to the magnitude and the significance of the contract to provide California's hearing and mediation systems, it is important that the CDE have a contract manager/liaison who is able to monitor the implementation of the contract, enforce deliverables, facilitate the resolution of fiscal or other administrative resource issues, and participate at the table with an advisory group to address system issues as they arise. To maintain the integrity of the hearing and mediation systems and avoid even the appearance of impropriety, it is essential that the role of the contract manager and applicable monitoring and enforcement procedures and standards are clearly defined and publicly stated.

RECOMMENDATION

Stakeholder Agreement

- The CDE should designate a contract manager within CDE who is knowledgeable about special education hearing and mediation systems, has the authority and time dedicated to act as a liaison to expeditiously resolve resource and other logistical issues as they arise, and to participate as a member of any established advisory group.

  Six of the eighteen Stakeholders recommend the contract manager be an attorney.

3. DATA COLLECTION

The Quarterly/Annual Reports currently produced by the Master Contractor provide comprehensive and valuable information on trends in the hearing and mediation systems on issues such as number of hearing requests, representation, mediation successes, numbers of days of hearings, appeals to court, and prevailing parties. The careful analysis of this data and consideration by individuals knowledgeable in hearing and mediation systems, would have alerted the CDE to many of the important substantive trends revealed through this study. For example, the concern, regarding the decrease in mediation success rates and increasing use of settlement conferences on the first day of hearing has been apparent throughout, at least, the past five-year period.

It may be desirable to request that the Master Contractor collect additional data to assist in the identification of trends or to integrate with other data collection systems in the CDE. However, the CDE is encouraged to first consider and apply the valuable information already collected through the master contract and to consider the reporting of some existing data already collected by the current Master Contractor, such as the net and gross days from request for a hearing to the issuance of the decision and the correlation of party data on the mediation surveys.

A national survey of State Departments of Education's data collection efforts in special education mediations and hearings, provides a base of comparison for California's relatively comprehensive data collection efforts:

1. All of the states collect data on the number and name of the LEAs involved in the mediation and hearing requests and completed mediations and hearings, and the issues of disagreement;
2. Over half of the states collect data on the types and nature of mediation agreements;
3. Seven states collect information regarding the impact of the mediation agreement after it was carried out;
4. Forty-seven states collect information regarding follow-up activities that have occurred within school systems, as a result of the hearing decision;
5. Six states collect satisfaction information from the parties on the hearing experience; and
6. Four states collect information regarding the impact of the hearing decision.[63]

During the conduct of this study, some school personnel expressed a desire to have a follow-up of the impact of a hearing decision on the education of a student. The CDE may want to contact the several states collecting follow-up information and hearing satisfaction information for models of data collection. Due to the differing perception of parties to the same mediation or hearing experience, it is recommended that satisfaction information be correlated by case as much as possible to maximize the usefulness of the information.

Data collection is time-consuming, and can be viewed as intrusive to an individual's privacy and the process. Therefore, it is recommended that the CDE consult with the Master Contractor and parent and school representatives with extensive involvement in the process to consider the desirability of specific data, its intended use, and the least intrusive manner to collect the data.

National interest in the topic of special education hearing and mediation systems is high. There are several national data collection efforts focused on hearing systems and the effectiveness of mediation through organizations such as the National Association of Special Education Directors of Education and national centers such as CADRE. The efficacy of these national data collection efforts is limited by the differences in common definitions. For example, in determining mediation success rates, the definition of mediation success can be either those cases resolved at mediation or those cases resolved at and after mediation, but before the hearings are convened.

[63] National Association of State Directors of Special Education, Project Forum, Dispute Resolution Activities: State Data Collection - July 1999.

The CDE is encouraged to work with national organizations to establish some common definitions to facilitate the collection of meaningful and accurate data, and to participate in and review future data collection efforts that may provide comparative data to assist in the ongoing review and enhancement of California's systems.[64]

RECOMMENDATION

Stakeholder Agreement

- The CDE should determine required and desirable data to be collected by the Master Contractor in the administration of the mediation and the hearing systems, including the efficacy of collecting economic, cultural and linguistic data related to access to the systems in a manner that is unobtrusive. The budget for the Master Contractor must include consideration of the cost of this recommendation.

4. REQUEST FOR PROPOSAL FOR THE MASTER CONTRACT

CONCERN

Some concern was expressed through public input that the Request for Proposal for the master contract for the hearing and mediation systems must first be based on extensive qualitative factors before competitive cost proposals are weighed.

RECOMMENDATION

Stakeholder Agreement

- In order to ensure the contract award for the master contract for the hearing and mediation systems is substantially based on qualitative factors, including the recommendations in this Report, the CDE must carefully consider the definition of a "Responsible Bidder" in the development of the Request for Proposal.

[64] There are several known studies that were being conducted simultaneously with the issuance of this Report that will provide new data in the future. Two such studies are the Center for Special Education Finance at the American Institutes for Research, on special education expenditures, and the University of Southern Mississippi , Department of Special Education, on mediation.

L. SUSTAINABLE EFFORT

WHAT THE DATA REVEAL

The current Master Contractor established a diverse advisory body comprised of individuals with extensive involvement in the system to advise them on the mediation and hearing systems.

CONCLUSION

Consistent consultation of the Master Contractor with an advisory body comprised of individuals with extensive involvement in the system has the capacity to provide important perspectives, opinions and knowledge on the implementation of the hearing and mediation systems on an ongoing basis. This would enable the Advisory Body to advise the Master Contractor and the CDE on the design of solutions for systemic issues as they arise.

RECOMMENDATION

Stakeholder Agreement

- The CDE should require the entity administering the hearing and mediation systems to maintain an advisory committee comprised of individuals with diverse and extensive involvement in the system and to meet regularly with the advisory committee to advise the Master Contractor and the CDE on the design of solutions for systemic issues as they arise. To facilitate member's participation, the budget for the hearing and mediation systems must include a budget for travel expenses.

M. STABILITY IN FUNDING

WHAT THE DATA REVEAL

The current system of contract awards for the master contract shows a history of unrealistic projections of expenditures based on historical trends. For example, the

1993-1996 contract award was for $3 million; however, the contract was amended five times during the contract period to add nearly $1.7 million. The 1997 - 1999 contract was awarded in April 1997 for $4.1 million. This represented a 10.3 percent reduction over the amount spent in the previous contract period.[65]

As a result of unrealistic budgetary projections, the master contract is repeatedly amended during the contract period and significant delays are experienced in the payment of invoices. At one point in this current fiscal year, the Master Contractor did not receive payment for seven months with outstanding invoices totaling over $1 million.

CONCLUSION

Stakeholder Agreement

- There is a budgetary history with the master contract to provide the hearing and mediation systems that projects budgets based on unrealistic trends in the use of the hearing and mediation systems and endangers the stability of the system due to the slow rate of payment for costs incurred. Adequate and stable funding with regular payment of invoices is critical to the maintenance of efficient and effective hearing and mediation systems.

RECOMMENDATIONS

Stakeholder Agreement

- The CDE should base the budget for the administration of the hearing and mediation systems on realistic projections of the use of the systems to ensure stability in funding and the maintenance of the level of quality desired by all. In order for a contractor to implement the hearing and mediation systems, timely payment of invoices for costs incurred is essential.[66]

Stakeholder Agreement

- The projected budget for the administration of the hearing and mediation systems should consider the fiscal impact and ensure funding for expedited hearings in the area of discipline, the right of both parties to obtain a written verbatim transcript of a hearing and the implementation of any other recommendations in this Report with noted cost implications.

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[65] Audits and Investigations Divisions Augmentation Report 9/14/98; Master Contractor's December 15, 1997 budget augmentation request.

[66] This recommendation is consistent with CDE's Audits and Investigations Divisions, September 14, 1998 review of the requested Augmentation under the master contract.

N. RELATED STATUTORY REVISIONS

INTRODUCTORY REMARKS

The provisions relating to the hearing and mediation systems in the Education Code and Title 5, California Administrative Code have been amended provision by provision for over twenty years as federal and State law, policies and procedures have changed. There are some internal inconsistencies in the code and regulations and a lack of clarity in some provisions relating to mediation prior to filing for a hearing, mediation and the conduct of the hearing. The recent significant revisions in the area of discipline under the IDEA Amendments of 1997, P.L. 105-17, will also require the clear integration of the preliminary procedures for students with disabilities for disciplinary exclusions in excess of ten school days, the availability of interim alternative educational settings and expedited hearings.

WHAT THE REVIEW REVEAL

The following reflect the major inconsistencies / concerns of this Contractor in the area of the hearing and mediation systems:[67]

- The right of the parties to a hearing to be informed at least ten calendar days prior to a hearing of the issue to be decided will, in some cases, be insufficient to allow for the disclosure of evidence and evaluations to the parties and the Hearing Officer five business days before the hearing. (Education Code §56505(e)(6) and (7); 34 C.F.R. §300.509(a) and (b)).

- The "stay-put" provision for mediation prior to the filing of a request for a hearing is not widely known by parents and the perceived absence of "stay-put" has served as a deterrent to parents accessing mediation only. The placement of the provision in Education Code Section 56346(b) should be reconsidered.

- The prohibition on attorneys or other independent contractors providing legal advocacy services, although intended to serve a laudatory purpose of an informal process conducted in a non-adversarial atmosphere, has served as a deterrent to the use of mediation prior to the filing of a request for a hearing.

- Education Code Section 56505(e)(4) and (e)(5) is inconsistent with the IDEA Amendments of 1997, P.L. 105-17 that provide that any party to the hearing has a right to obtain a written, or, at the option of the parents, electronic verbatim

[67] It should be noted that one area of California law that exceeds federal law, and creates an additional juncture of disagreement, is the requirement for consent to all components of the IEP. (Education Code Section 56346) There are additional areas of inconsistencies between provisions for students with disabilities in the Education Code and Title 5, California Administrative Code, and federal law that were noted during this study. The CDE is encouraged to do a comprehensive review of all of the provisions for students with disabilities for consistency and clarity.

record of the hearing and findings of fact and decisions. (20 U.S.C. §1415(h); 34 C.F.R. §300.509(a)(4) and (5))

- Education Code Section 56500.3 sets forth extensive timelines and rights of the parties in prehearing mediation. Education Code Section 56501(b)(1) incorporates the right to the prehearing mediation, and in the following subsection (b)(2) establishes the right to a mediation conference at any point during the hearing process. It is unclear whether the rights and protections of Education Code Section 56500.3 apply to mediation conferences after the filing of a request for a hearing.

RECOMMENDATIONS

Stakeholder Agreement

- The CDE consider legislative and regulatory proposals to integrate the current statutory and regulatory provisions and consider recommendations incorporating the following statutory revisions:

- The revision of Education Code Section 56505(e)(6) to ensure the right of the parties to a hearing to be informed at least ten business days prior to a hearing of the issue(s) to be decided. This is necessary to allow for the disclosure of evidence and evaluations to the parties and the Hearing Officer five business days before the hearing and to comply with the timeline for a written offer of settlement pursuant to Title 20, United States Codes, Section 1415(i)(3)(D). Consider the efficacy of maintaining the non-initiating party's statement of issue and resolution.

Stakeholder Agreement

- The revision of Education Code, Chapter 5, Procedural Safeguards to include the "stay-put" provision for mediation prior to the filing of a request for a hearing to clearly establish the right. (Reference: Education Code §56346(b))

Stakeholder Agreement

- The revision of Education Code Section 56500.3 to allow parties to request a prehearing mediation with or without being accompanied by an attorney or advocate.

Stakeholder Agreement

- The revision of Education Code Section 56505(e)(4) and (e)(5) to provide that any party to the hearing has a right to obtain a written, or, at the option of the

parents, electronic verbatim record of the hearing and findings of fact and decisions.

Stakeholder Agreement

- The revision of Education Code Section 56501(b)(1) to clearly incorporate the protections of the IDEA set forth in Title 34 Code of Federal Regulations, Section 300.506, including the requirement that mediation procedures must ensure the mediation is not used to deny or delay a parent's right to a hearing and any additional State protections included in Education Code Section 56500.3.

THE END OF THE REPORT

THE BEGINNING OF A "COMMON VISION"

APPENDIX A

STUDY PROTOCOL

STUDY PROTOCOL

Interviews

During the course of the study, this Contractor conducted open-ended interviews with a number of individuals and representatives on issues of concern and recommendations for change. These interviews included individuals in the following categories:

- CDE staff;
- Mediators and Hearing Officers, the administrative staff for the Master Contractor, and members of the advisory group for the Master Contractor;
- District Special Education Directors and SELPA Directors;
- Attorneys or other representatives of LEAs;
- Attorneys or other representatives of parents; and
- Individuals from national organizations, and institutes of training or technical assistance involved in, or knowledgeable of, special education hearings and mediations.

Surveys were sent to those SELPAs implementing formal "alternative dispute resolution" models, and responses analyzed. Open-ended interviews were also conducted with the SELPA Directors with a large reduction of filings in recent years, and analyzed to ascertain trends. Surveys were sent to the Mediators with a variety of questions, including a description of their case management protocol, and analyzed.

Available Literature and Statistics

The Contractor extensively reviewed all available literature and studies conducted in or related to the area of special education hearing and mediations and audits and monitoring reports related to California's systems. The Quarterly / Annual Reports issued by the Master Contractor since 1989 were examined in detail for statistical trends, as well as the Master Contract Request for Proposal, budget and schedule for payment of invoices, the results of the evaluation surveys of Mediators, and the resumes of all Mediators and Hearing Officers. Pay scales and job specifications for the Master Contractor and for Mediators and Hearing Officers in the public and private sector were examined to determine comparability of qualifications and compensation.

Organizations

During the course of the study, the Contractor appeared before, and received input from, members of the SELPA Directors' organization, the Special Education Administrators of County Offices' organization and the Advisory Committee for Special Education. In addition, the California Office of Administrative Hearings was contacted and information received on that Office's procedures, qualification, compensation, training, manuals, and calendaring.

Public Hearings

Under the auspices of the Advisory Commission for Special Education and the CDE, seven public hearings were conducted throughout the State. Focus questions derived from the Questionnaire were provided to the participants to facilitate the testimony.

Fifty-nine individuals testified before the Contractor and member(s) of the Commission over the course of the public hearings. The hearings were held in San Diego (two public hearings), El Monte, San Francisco, Sacramento, Encino, and Fresno. As a result of this study, it is apparent that a systematic method of disseminating information to individual parents in California is lacking. This concern was raised repeatedly by parents at the public hearing and through comments in the Questionnaire.

Questionnaire

The Questionnaire was developed by the Contractor based on the required and optional questions in the Request for Proposal to conduct this evaluation study. The Master Contractor was provided an opportunity to review and comment on each of the questions and the rating systems in the Questionnaire to ensure the questions were fairly stated and consistent with current practices. Revisions were made consistent with the Master Contractor's input.

The Questionnaire was available on the CDE web site and the Protection and Advocacy web site. It was handed-out, mailed or e-mailed to over 250 individuals. On behalf of the Contractor, the Master Contractor mailed 99 Questionnaires to parents who had participated in the hearing and mediation processes without representation in the last year. A notice of the Questionnaire and the public hearings was included in a major mailing from the CDE to individuals and organizations within the special education community, including all Parent Training and Information Centers with Community Resource Centers, Protection and Advocacy, California School Psychologist's Association, California Speech and Hearing Association, California Resource Specialists (and CARS+), low incidence network, Cal Stat, California Deaf Blind Services and California Teachers Association.

There were 12 Questionnaires returned in either an unusable format, or too late to be incorporated in the calculation of responses. The data and comments from these Questionnaires were considered with other information collected outside the Questionnaire process. Several Questionnaires were submitted without names, and were disregarded.

The number of Questionnaires returned was small, considering the demographics in California. However, the representatives of parents and school personnel expand the validity of the Questionnaire due to their large client base, and extensive experience with the system:

- Nineteen parents responded to the Questionnaire;

- Twenty-two parent representatives responded to the Questionnaire. These individuals currently represent 564 clients;
- Fifty-seven school personnel responded to the Questionnaire; and
- Fifteen representatives of school personnel responded to the Questionnaire. These individuals currently represent 746 clients, including Los Angles Unified School District.

Those individuals who had participated in over five hearings or mediations were considered to have extensive / significant experience in the system for purposes of the Report. This data was isolated, and reported as such, if there was a significant difference in the perceptions of individuals with a single or occasional experience with the system.

Other States

During the course of the study, the Contractor reviewed all applicable California and federal laws and regulations and other state's laws and regulations relating to the hearing and mediation systems. The systems of other states were reviewed to identify alternative effective models of dispute resolution and practices to enhance the efficiency and effectiveness of the hearing and mediation processes. Interviews were conducted with representatives from other states' offices of special education with contractual agreements for the provision of hearing and mediation services and with representatives from other states' offices of special education with a downward trend in the filing of hearing requests.

Work Products

This Contractor examined all forms, notices and training material used by the Master Contractor, reviewed over 125 decisions and orders, and reviewed ten randomly selected verbatim electronic records of cases. Randomly selected calendaring weeks were analyzed to ascertain trends in calendaring. Over 130 case files were analyzed for data, including 19 case files of cases that were open longer than a year, and 26 cases opened and closed within a year. The Contractor's review of work products included all of the published decisions rendered by the Ninth Circuit Court of Appeals in the review of California's hearing decisions, and some additional Federal District and State Court decisions.